TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924

No. [redacted]64

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

E. E. HANNA.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

PETITION FILED FEBRUARY [redacted], 1925.

CERTIORARI AND RETURN FILED JULY 13, 1925.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 313.

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

R. L. HANNA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

INDEX.

	Original.	Print.
Record from the circuit court of Poinsett County	1	1
Caption	1	1
Complaint	2	1
Answer	5	2
Judgment	8	3
Motion for new trial	10	4
Order overruling motion for new trial	13	5
Bill of exceptions	14	5
Testimony of R. L. Hanna	15	6
Joe Haste	28	12
J. T. Hunn	33	14
R. L. Hanna	39	17
V. Otey	41	17
Exhibit to Otey's Testimony—Live-stock contract between Director General of Railroads and R. L. Hanna, January 9, 1921	45	19
Testimony of R. D. Wilson	59	27
J. E. Arnold	64	29

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	Original.	Print.
Testimony of Joe Haste	73	34
Defendant's requested instructions	75	35
Instructions of the court	78	37
Verdict	83	39
Motion for new trial	84	40
Order overruling motion for new trial	87	41
Order allowing appeal	87	41
Reporter's certificate	88	41
Order settling bill of exceptions	89	42
Clerk's certificate	90	42
Fee bill	91	42
Proceedings in supreme court of Arkansas	93	43
Argument and submission	93	43
Judgment	94	43
Opinion, Humphreys, J	95	44
Petition for rehearing	101	47
Order overruling petition for rehearing	105	49
Clerk's certificate	106	49
Writ of certiorari and return	107	50

1 IN THE

CIRCUIT COURT OF POINSETT COUNTY, ARKANSAS, FIRST DIVISION, DECEMBER TERM, 1921.

Pleas Before the Honorable J. M. Futrell, Judge of Poinsett Circuit Court, on the 20th Day of December, 1921.

No. 1810.

R. J. HANNA, Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, Defendant.

TRANSCRIPT.

2 In the Poinsett Circuit Court.

[Title omitted.]

Complaint at Law.

Comes the plaintiff, R. L. Hanna, and for his cause of action against the defendant, Missouri Pacific Railroad Company, alleges:

That defendant is a corporation engaged in the business of a common carrier, and as such, operates trains for the purpose of carrying passengers and live stock in this State, and between Harrisburg, Arkansas, and National Stock Yards, Illinois, and was so engaged at the time of the injury hereinafter set out.

Plaintiff further alleges that he is in the business of buying and shipping live stock, and that he was, on or about the 1st day of January, 1921, engaged in said business of buying and shipping live stock;

Plaintiff further alleges that on or about the 1st day of January, 1921, he made a shipment of stock from Harrisburg, Arkansas, to National Stock Yards, Illinois, over defendant's railroad, and that he accompanied said shipment, riding on the same train that carried said shipment of stock;

Plaintiff further alleges that while enroute with said shipment of stock, and while on defendant's train, he was advised by
3 one of defendant's employees, the conductor in charge of said train that it would be necessary for plaintiff to change trains at Gale, Illinois, and that on nearing the yard at Gale, Illinois, he was further advised by the conductor of said train to alight from said train at said yard house;

Plaintiff further alleges that acting upon the advice of said conductor he did alight from said train, and in so doing was thrown

to the ground with great violence, which caused him to sustain serious injuries from which injuries he has not yet recovered;

Plaintiff further alleges that he immediately filed a claim against said Railroad Company in the sum of $2,000.00 for the injuries so sustained by him through the negligence of said Defendant Railroad Company;

Plaintiff further alleges that at the time he was thrown from said train it was so dark that he could not tell how fast said train was moving but relying upon the advice of said defendant's employees he acted solely upon said advice, thereby sustaining injuries and damages in the sum of $2,000.00, which sum he believes he ought to recover;

Wherefore, premises considered, plaintiff prays judgment against defendant in the sum of $2,000.00 and for cost and for all other proper relief. A. B. Caplinger, Attorney for Plaintiff.

4 Summons issued April 13th, 192-.
Served April 14th, 1921.

5 In the Poinsett Circuit Court.

[Title omitted.]

Answer.

Defendant admits that on or about the 1st day of January, 1921, plaintiff made a shipment of stock from Harrisburg, Arkansas, to National Stock Yards, Illinois, over defendant's Railroad, and that he accompanied said shipment, riding on the same train that carrier said shipment of stock.

Defendant denies that while en route with said shipment of stock, and while on defendant's train, plaintiff was advised by one of defendant's employees, the conductor in charge of said train, that it would be necessary for plaintiff to change trains at Gale, Illinois, and denies that on nearing the yard house at Gale, Illinois, plaintiff was advised by the conductor to alight from the train at said yard house.

Defendant denies that acting upon the advice of the conductor plaintiff did alight from said train, and in so doing was thrown to the ground with great violence. Defendant denies that plaintiff sustained serious injuries by reason of any fall as alleged in the complaint, and denies that he has not yet recovered from such injuries.

Defendant says that if it be a fact that plaintiff undertook
6 to alight from a moving train, he did so voluntarily and not by reason of any advice or invitation on the part of the conductor or any employee of defendant, and if he was injured by falling in undertaking to so alight, such injury was solely the result of his own carelessness and negligence in failing to exercise

ordinary care for his own safety, and defendant is not liable therefor. Defendant pleads contributory negligence on the part of plaintiff as a defense to this action.

Defendant admits that it was in the night when the freight train upon which plaintiff was traveling reached Gale, Illinois, but denies that it was so dark that plaintiff could not tell how fast said train was moving, and again defies that in undertaking to alight from the train plaintiff acted upon advice of the conductor, and again denies that the conductor told him, or advised him, or invited him, to alight from the train, and again denies that he sustained injuries and damages in the sum of $2,000.00 or any other amount, and again denies that any damage sustained by him was due to negligence of the defendant, its agents, servants or employees, in advising him to undertake to alight from the train while it was in motion.

Defendant states as a separate defense to this action that plaintiff was being transported free of charge on said freight train: that
7 he was being transported free of charge under and in accordance with the terms of a written contract and agreement between him and the defendant, a copy of which said contract and agreement is hereto attached marked Exhibit "A" and made a part of this answer. In said contract it is provided that the plaintiff remain in the caboose attached to the train drawing the cars, while the train was in motion; also that he would get on and off the caboose while it was still. And defendant says that these agreements on the part of plaintiff constituted part of the consideration for his transportation on said train, and pleads his violation of these agreements as a separate defense to this action.

Having fully answered, defendant prays judgment in its behalf and that it be hence dismissed with its costs. Gordon Frierson, Attorney for Defendant.

8 Dec. 20, 1921.

[Title omitted.]

Judgment.

On this day this cause coming on to be heard, the plaintiff appeared by his attorneys, A. B. Caplinger and I. M. Greer, and the defendant, appearing by its attorney, Gordon Frierson, and both parties announcing ready for trial thereupon T. W. Sparks and eleven others of the regular panel of Petit jurors of this court were duly selected, impaneled and sworn, according to law to try the issue of fact arising herein; and after hearing all the evidence adduced, the instructions of the court and argument of counsel, the jury retired to consider its verdict and, after deliberating thereon, returned into the court the following verdict:

"We, the jury, find for the plaintiff, and assess his damages at the sum of $2,000.00. T. W. Sparks, Foreman."

It is therefore ordered, and adjudged by the court that the plaintiff, R. L. Hanna, do have and recover of and from the defendant, Missouri Pacific Railroad Company, the sum of $2,000.00 together with interest thereon, from this day until paid, at the rate of six (6) per cent per annum, together with all cost herein expended, for which execution may issue.

9 Motion for a new trial filed by the defendant and overruled to which ruling defendant excepts and prayed for an appeal to the Supreme Court, which prayer is by the court granted. Defendant given 120 days in which to file Bill of Exceptions.

10 In the Circuit Court of Poinsett County, Arkansas, First Division, December Term, 1921.

[Title omitted.]

Motion for New Trial.

Comes the defendant herein, Missouri Pacific Railroad Company, and moves the court to set aside the verdict of the jury and judgment of the Court rendered thereon, and grant it a new trial and for cause says:

1st. The verdict of the jury is contrary to the evidence.

2nd. The verdict of the jury is contrary to the law.

3rd. The verdict of the jury is contrary to both the law and the evidence.

4th. The verdict of the jury is not supported by the evidence.

5th. The Court erred in giving to the jury, over the objections of the defendant, instruction numbered 1, of its own motion. And erred in refusing to modify same as requested by defendant.

6th. The Court erred in giving to the jury, over the objections of the defendant, instruction numbered 2, of its own motion.

7th. The Court erred in giving to the jury, over the objec-
11 tions of the defendant, instruction numbered 3, of its own motion.

8th. The Court erred in giving to the jury, over the objections of the defendant, instruction numbered 4, of its own motion.

9th. The Court erred in giving to the jury, over the objections of the defendant, instruction numbered 5, of its own motion.

10th. The Court erred in giving to the jury, over the objections of the defendant, instruction numbered 6, of its own motion.

11th. The Court erred in giving to the jury, over the objections of the defendant, instruction numbered 7, of its own motion.

12th. The Court erred in refusing to give instruction numbered 1, as requested by the defendant.

13th. The Court erred in refusing to give instruction numbered 2 as requested by the defendant.

14th. The Court erred in refusing to give instruction numbered 3 as requested by the defendant.

15th. The Court erred in refusing to give instruction numbered 4, as requested by the defendant.

16th. The Court erred in refusing to give instruction numbered 5, as requested by the defendant.

17th. The Court erred in refusing to give instruction numbered 6, as requested by the defendant.

18th. The Court erred in refusing to give instruction numbered 7, as requested by the defendant.

12 19th. The Court erred in refusing to give instruction numbered 8, as requested by the defendant.

20th. The Court erred in refusing to give instruction numbered 9, as requested by the defendant.

Wherefore, Defendant prays that it be granted a new trial herein. Gordon Frierson, Attorney for Defendant.

13 Dec. 20, 1921.

[Title omitted.]

Order Overruling Motion for New Trial.

Now on this day comes the defendant and files its motion for a new trial herein, which is by the Court seen and heard and which is by the Court overruled. To which ruling of the Court the defendant then and there and at the time excepted and its exceptions are noted of record.

And the defendant on the same day prays an appeal from this judgment hereon to the Supreme Court, which appeal is granted and the defendant is given 120 days in which to file its Bill of Exceptions herein.

14 Filed April 10th, 1922. T. T. Mardis.

In the Circuit Court of Poinsett County, Arkansas, First Division, December Term, 1921.

[Title omitted.]

BILL OF EXCEPTIONS.

Be it remembered, That on the 20th day of December, A. D. 1921, the same being a regular day of the December, 1921 Term, of the Poinsett Circuit Court, sitting in the First Division thereof, the above entitled cause came on to be heard, and came the Honorable J. M. Futrell, regular judge, present and presiding, and a jury to try the issues of the facts, when the following proceedings were had and done, to wit:

15 Thereupon, the plaintiff, to maintain the issues on his part, offered the following evidence, to-wit:

R. L. HANNA, the plaintiff, being first duly sworn, testified on his own behalf as follows, to-wit:

Direct examination.

By Mr. Caplinger:

Q. Mr. Hanna, you are the plaintiff in this law suit?
A. Yes, sir.
Q. Where do you live, Mr. Hanna?
A. I live at Harrisburg.
Q. How old are you?
A. I was forty-five the 24th day of last January.
Q. In what business are you engaged, Mr. Hanna?
A. Well, I have been dealing in stock for a number of years.
Q. About how many years?
A. Well, I suppose about fourteen or fifteen years regular.
Q. Tell the jury whether or not on or about January 1st, 1921, you shipped a car load of stock to the National Stock Yards over the Missouri Pacific Railroad, and accompanied this car?
A. Well, I shipped two car loads of cattle, I think it was, and one car load of hogs, and I shipped them to St. Louis from Harrisburg; I believed I billed them from here.

16 Q. Now, Mr. Hanna, you allege in your complaint that you received an injury at a place called Gale, Illinois: Just tell the jury the facts connected with this accident?

A. Well, it was as we were getting into Gale. Well, Gale, Illinois, is just across the river from Illmo. We were just pulling in to the yar- house, and the conductor says in the caboose, "Get off here at the yard house and it will save you from walking through these dark yards," he says, "Get off now at the yard house," and every one of us began to gather up our suit cases and we started to the door. Well, the conductor was in front and Mr. Arnold was next to him, I believe, and I was next, or I got off next to Mr. Arnold, and I understood him to say while we were in the door, "Get off." Well, he stepped off and Mr. Arnold stepped off, and I got down to step off. I thought the train was just moving but when I got off the distance from where I fell to where they got off was as far as across this court room. I got out of the door and stepped on the cross brace at the side door and stepped off, and when I stepped off it throwed me down and threw me backwards and I dropped my suit case, and when I hit the ground it rolled me from the train and I suppose I hit the rail on the other side where I stopped at and I lost my pocket book right up against the rail on the other track over there. I sup-

17 pose that track must have been, I will say from six to twelve feet across but I hit that rail over there. After I fell it rolled me over to this other rail and there is where my pocket book was found.

Q. Now, Mr. Hanna, the conductor on that train knew that you were getting off, did he?

A. Yes; we were right there, and he said, "Get off here at the yard house," and we just followed him right on; he is bound to have known it.

Q. What did he say to you after he got off?

A. Well, I understood him to say—I don't know whether he was on the ground or on the steps—I understood him to say, "Get off." I know he said while he was inside of the car for us to get off, and I think he was on the steps when he said "Get off."

Q. Did he tell you at any time not to get off at that place?

A. No, sir.

Q. Now, Mr. Hanna, had there been any conversation between you and the conductor of that train about some crime that had been committed in that yard a day or two before that?

Mr. Frierson: That's objected to.

Mr. Caplinger: I want to show that that was one of the reasons why the conductor told him to get off.

The Court: The objection is overruled.

Mr. Frierson: Note my exceptions.

18 A. About all I understood, they were talking about some people getting knocked in the head and spoke of that as being one of the reasons why he wanted us to get off.

Q. About what time of the night was this?

A. I won't say.

Q. Well, was it dark?

A. I won't say what time of the night it was, but it must have been pretty early up in the night.

Q. Any way, it was real dark?

A. It was dark.

Q. Could you see the ground out there from the train?

A. Well, I could just kinder see. The lights were burning in front of the yard house, but the train looked to me like—when I went to get off I understood from the conductor that he had give signals, or it was understood they were to stop there, or *clos* down for us to get off.

Q. Now, Mr. Hanna, what was your physical condition from there on into St. Louis?

A. Well, I was pretty sick after it throwed me. We went in and ate a lunch, and I could feel a tinglingness on my left side, it was in my hands and knees more, and we ate a little lunch and walked out to get on the train, and just as I was getting to the caboose I got powerful sick, I began to vomit and was sick on into St. Louis.

19 The fact of it is, had pains in my body and legs that was about all I could do to stand.

Q. Now, what part of your body was really injured by that fall?

A. Well, it seemed to be mostly in my legs and hip, and I have trouble in my breast, and my left shoulder has gotten better.

Q. Have you been under the treatment of a physician for this injury?

A. Yes, sir.

Q. What doctor has been treating you?

A. Doctor Hunn.

Q. How long has he been treating you?

A. Well, after I came home I got Doctor Hunn to give me a prescription and some medicine.

Q. Have you yet recovered from that injury?

A. No, sir.

Q. Tell the jury how you are afflicted, or how you are affected from that injury?

A. Well, it is mostly in my hips and legs and sometimes my breast hurts me, and it looks like if I could get in there and pull out something it would get alright, and at times my leg seems like it is going to come back to good feeling, and I ain't got good use of it.

Q. Does it pain you at night?

A. Yes, sir; sometimes I can't sleep much, and have to get up and set up, and at times I can rest better than I do at other times.

20 Q. Upon arriving at the National Stock Yards what did you do there; did you see any of the agents of the railroad company?

A. While I was in St. Louis, I won't be positive whether it was that time or after that sometime I saw the claim agent, I have forgotten his name, but he came over to East St. Louis and wanted to talk to me about it.

Mr. Frierson: I am going to object to this detailing the conversation with the claim agent or others.

The Court: What objection could there be to a conversation with the claim agent?

Mr. Frierson: It is immaterial; the claim agent has no authority to bind the Company.

The Court: Let the objection be overruled.

Mr. Frierson: Note my exceptions.

Q. Did you — out in any claim with the railroad company for this injury?

A. Yes, sir; Mr. Egglely that is in the stock yard building takes claims against all railroads and you can go in there and turn in your claim to him against the railroad, and I went in there and turned in this claim to Mr. Egglely against the railroad.

Q. Did the railroad company ever offer to examine you after the accident?

A. Well, as I started to say awhile ago, I was there in St. Louis and the claim agent——

Mr. Frierson (interrupting): May it pleas- the court, that's objected to.

21 Mr. Caplinger: I want to show that they asked Mr. Hanna about the injury and then refused to examine him.

The Court: Well, that is immaterial; the objection will be sustained.

Q. You were riding on the caboose of this train, were you not?
A. Yes, sir.
Q. You were a passenger on that caboose on that train?
A. Yes, sir; I had a right there.
Q. By what authority were you riding on that train?
A. Well, I was in charge of some stock to St. Louis.
Q. And you were entitled to be carried with the stock?
A. Yes, sir.

Cross-examination.

By Mr. Frierson:

Q. You were traveling as a stock man under the right given you by the bill of lading?
A. Yes, sir; with the stock.
Q. On a stock contract; that was your transportation, wasn't it?
A. Yes, sir; in care of the stock.
Q. Have you the original or a copy of that bill of lading?
A. No, sir; I think I gave it back for a ticket back home; I ain't positive.
Q. You did not pay for your transportation, except the freight on your stock; is that right?
22 A. The freight on the stoc-, yes, sir.
Q. Now, Mr. Hanna, you say you have been in that line of business for fourteen or fifteen years?
A. Yes, sir.
Q. Buying and selling stock?
A. Yes, sir.
Q. Did you ever deliver a shipment of stock to the National Stock Yards in St. Louis before this?
A. Yes, sir.
Q. For about how long, over what terms of years does that extend?
A. Oh! I guess twelve years.
Q. You have accompanied your stock on a great many occasions up there, have you not?
A. Yes, sir.
Q. Riding on a drover's pass?
A. Yes, sir; under a contract that we have to take care of them.
Q. Did you ever go through Gale before in a caboose?
A. Yes, sir.
Q. Frequently?
A. Well, every time I went over the Missouri Pacific, I did.
Q. A large number of times?
A. After they changed the yards over there, I had been going through there every time I would go over the Missouri Pacific.
23 Q. Had you ever changed cars or caboose there in that yard?
A. Yes, sir.

Q. It was nothing new to you to be riding on a caboose through there, was it?

A. No, sir.

Q. Did you know this conductor, Mr. Wilson, who was on the caboose that night; did you know him?

A. Well, I had ridden a few times with him.

Q. And you had ridden with other conductors, too?

A. Yes, sir.

Q. Do you know anything about there being a rule against conductors telling passengers to get off of trains while they were moving?

A. I don't know anything about the rules.

Q. Do you know whether that caboose stopped or not, after you got off?

A. They said it stopped after it went up the track a piece.

Q. You got off and fell: Did you get up and go to the yard office?

A. Yes, sir.

Q. Did you tell them you were hurt then?

A. No, sir; I told them my hands and knees were tingling a little.

24 Q. You say you lost your pocket book; who found it, Mr. Hanna?

A. I don't know, some one went out there with me.

Q. You and another man went back?

A. Yes, sir.

Q. How far did you go from the yard office?

A. About as far from the yard office as across this court room.

Q. Who went with you, do you remember?

A. No, sir

Q. You don't know where the train actually stopped, the caboose, finally?

A. Well, they said it stopped.

Q. Did Mr. Haste come along by you while you were on the ground?

A. No, sir; I didn't see him come by.

Q. Where was the eating house with reference to the yard office, was it between——

A. (Interrupting.) It was right under the yard office. The main part of it is up stairs and the eating part is on the lower floor.

Q. You say Mr. Arnold was on there that night, I believe?

A. Yes, sir.

Q. And after the conductor got off Mr. Arnold got off?

A. Yes, sir.

Q. Mr. Arnold was between you and the conductor?

A. Yes, sir.

25 Q. Did you see Mr. Arnold get off?

A. I was right behind him; yes, sir.

Q. Where was Mr. Haste while you and Mr. Arnold were getting off?

A. I suppose he was in the caboose.

Q. Isn't it a fact that you went around Mr. Haste and got off?

A. I don't know anything about it; I don't recollect.

Q. But you recollect very positive what the conductor did or said, or what Mr. Haste said?

A. Yes, sir; I would not get off of a moving train at all. I thought the conductor had given signals, or they were going to stop for us to get off.

Q. Couldn't you see how fast you were going?

A. I couldn't see at night.

Q. Couldn't you see the ground?

A. I could not tell how fast they were going or I certainly would not have stepped off.

Q. You say you were treated by a physician when you came back from St. Louis?

A. Yes, sir.

Q. Are you still under the treatment of Doctor Hunn?

A. Yes, sir.

Q. When did you see him last?

A. I was up in his office this morning.

Q. Well, did you have any bones broken?

26 A. No, sir; not that I know of. I got a prescription from him and go get medicine, and when that gives out I go back and get more.

Q. And have you ever had an X-ray made?

A. No, sir.

Q. Did he tell you that your lungs or heart were affected?

A. No, sir; he told me that the nerve of my legs was wrenched.

Q. Which side of the car did you get off on.

A. On the right hand side going north.

Q. What did you tell the men when you ate your supper down there?

A. I disremember what I did tell them. I told them I was throwed, or something like that; I told them I didn't think I was hurt bad.

Q. Now, if that train was slowing up to stop the train was going faster at the time that the conductor and Mr. Arnold got off than it was when you got off, wasn't it?

A. I don't know about that.

Q. What were you holding to?

A. I had hold of the iron rods and stepped down to the ground, and I thought it was just barely moving.

Q. You were on that step by the side of the caboose?

A. Yes, sir.

Q. Didn't you look down and study the ground before you got off?

27 A. Well, I looked down, but I didn't think it was running very fast.

Q. Have you ever had any trouble with your eyes?

A. I never had any trouble with my eyes about seeing anything in day time.

Q. You can see as good as anybody?

A. I don't know whether I can see as good as anybody or not, but I can see.

Further deponent sayeth not.

28 JOE HASTE, being first duly sworn, testified on behalf of the Plaintiff as follows, to-wit:

Direct examination.

By Mr. Caplinger:

Q. Your name is Joe Haste?
A. Yes, sir.
Q. Where do you live, Mr. Haste?
A. I live here in town.
Q. What is your occupation?
A. Well, you might say, farming.
Q. Have you ever shipped any stock?
A. Yes, sir.
Q. Do you know Mr. Hanna, the plaintiff in this law suit?
A. Yes, sir.
Q. I will ask you if you were with Mr. Hanna on a train carrying some stock about the 1st of January, 1921, at the time he was injured at Gale, Illinois?
A. Yes, sir; I was with him.
Q. What was the occasion for your being on the train?
A. I had stock on the train.
Q. What authority were you riding on, or what kind of a pass or ticket or transportation did you have?
A. Well, I call it a stock pass.
Q. Who else was on that caboose at the time you arrived at Gale?
29 A. Well, the conductor and Mr. Hanna and Mr. Arnold, I believe his name is, and myself.
Q. Tell the jury what conversation was had between the conductor and Mr. Hanna and yourself, if any, was had about getting off at the yard office there at Gale?
A. Well, before we got into Gale, or at the yard house, I don't know, it must have been the fore part of the night, I will say between eight and ten o'clock, possibly about nine o'clock, and we were talking there discussing something about some supper, and a robbery or a killing; there had been a killing in Gale just a few days before that and, of course, the night was dark, I believe it was cloudy; anyway, after we pass the yard house there we have to go up in the yard I would say from a quarter to a half a mile, sometimes we go further than other times, and the conductor remarked that we might be able to get off at the yard house and save that walk back from up in the yard back to the yard house, and we all had grips and we got our grips and were standing in the door when we passed the yard house and the conductor got off and then Mr. Arnold got

off and then Mr. Hanna got off, and I stayed on. I didn't get off until the train stopped.

Q. Did the conductor call your attention to the fact that when you got to the yard house to get off again?

30 A. If he did, I didn't hear him.

Q. After he got off did you hear him say in substance, "If you are going to get off, get off"?

A. No, sir; I didn't hear that.

Q. Did the conductor—Did he know that you were getting ready to get off?

A. I think so.

Q. Did he tell you not to get off?

A. No, sir; if he did, I didn't hear it.

Q. You say it was real dark?

A. Yes, sir. Now, there was no lights along there. Gale is a small place and I don't know whether they have electric lights or not.

Q. Not all of the lights were artificial lights?

A. Yes, sir; I could see well enough to see that I didn't think I wanted to get off.

Cross-examination.

By Mr. Frierson:

Q. When the conductor got off, Mr. Haste, who was standing next to him?

A. Mr. Arnold.

Q. Who was next to Mr. Arnold?

A. I think I was.

Q. Where was Mr. Hanna standing with reference to the rest of you?

A. He was back of me.

Q. What did you do when it came your time to get off there?

A. I told him I would not get off.

31 Q. Told who you would not get off?

A. Mr. Hanna.

Q. Where was Mr. Hanna when you told him that?

A. He was standing right there by me. I was standing in the door like and he was behind me.

Q. And you told him you were not going to get off?

A. I told him that I would not take any chance, that I would stay on and ride to the end of the road.

Q. What did he say after you told him that?

A. He said he was going to get off.

Q. What did he say or do after you told him that?

A. Well, he jumped off.

Redirect examination.

By Mr. Caplinger:

Q. But the conductor did tell you about the time you arrived at the yard house to get off there and save that walk back?

A. Yes, sir.

Q. How did you know when you got to the yard house; did the conductor tell you that was the yard house?

A. I don't know that he did. I knew the yard house and he got off there.

Q. Did you have your suit case with you when you were standing at the door?

A. Yes, sir.

32 Q. At the time the conductor told you to get off at the yard house you got your suit cases ready to get off?

A. Yes, sir; I had my suit case and Mr. Hanna had his and Mr. Arnold had his. We all got ready to get off at the yard house.

Further deponent sayeth not.

33 J. T. HUNN, being first duly sworn, testified on behalf of the Plaintiff as follows, to-wit:

Direct examination.

By Mr. Caplinger:

Q. Your name is Dr. J. T. Hunn?

A. Yes, sir.

Q. You are a practicing physician and surgeon here in Harrisburg, Doctor?

A. Yes, sir.

Q. How long have you been practicing medicine and surgery?

A. Seventeen or eighteen years.

Q. Of what school are you a graduate of, Doctor?

A. The Louisville Medical College, of Louisville, Kentucky.

Q. Do you know Hanna, the plaintiff here?

A. Yes, sir.

Q. Is he under your treatment now, Doctor?

A. Yes, sir.

Q. How long has he been under your treatment, Doctor?

A. Well, since along last January, I believe.

Q. What are you treating him for, Doctor?

A. Well, for his leg mostly. He complains of a pain in his breast and in his leg.

Q. Did you make an examination of his leg, Doctor?

A. Yes, sir.

Q. What did you find, Doctor?

34 A. Well, it is bound to be caused from a nerve injury; there was no contusion or lasceration.

Q. What caused his injury, Doctor?

A. Well, he told me he got hurt in getting off of a train.

Q. What do you call that disease, Doctor?

A. A neuritis.

Q. Well, the injury he complained of, will that produce such a condition, Doctor?

A. Yes, sir; a condition—I mean an injury of that kind would produce a nerve change.

Q. Now, when did you examine Mr. Hanna last, Doctor?

A. Well, I guess it has been a month or two ago. He was in the office and I measured his leg, and it is some smaller than the other leg.

Q. You mean by that that it has shrivelled up?

A. Yes, sir.

Q. What causes that?

A. An injury to the sciatic nerve.

Q. Well, would an injury of that kind cause much pain, Doctor?

A. Well, an injury to the nerve is the most painful injury we have. We have two kinds of nerves, the motary nerves and the sensuary nerves.

Q. Would it be possible, Doctor, for one to know how long it would take a case of this kind to recover?

A. Well, an injured nerve which undergoes a degenerated process, which must take place, weakens the muscle, and we figure
35 on it taking two years for the nerve to regenerate. It will rebuild itself in time though.

Cross-examination.

By Mr. Frierson:

Q. Doctor, do you know whether or not Mr. Hanna has gone ahead pursuing his business or occupation since this injury?

A. Well, I don't have any knowledge of it that I could swear to, but I see him about. He has been about all of the time.

Q. He came to your office for treatment, did he?

A. Yes, sir.

Q. This sciatic nerve you spoke of, is that a spinal injury, Doctor?

A. Well, it is below the division of the spine.

Q. An injury to the leg itself irrespective of the spine might cause this pain to the sciatic nerve?

A. Yes, sir.

Q. Where is that nerve situated with respect to the muscles; is it covered by the muscles?

A. Yes, sir; it is deeply seated; it lies in next to the bone.

Q. To injure that nerve on the leg there, it would have to be a pretty severe injury to the flesh and muscles, would it not?

A. Yes, sir; if you injure it by direct violence, it would; if it was indirect violence, it would not. If you take a hammer and
36 strike here, that is what we call direct violence.

Q. Wouldn't the muscles be subject to the same strain or a similar strain?

A. Yes, sir; but they are much more elastic. If you injure a muscle it would get entirely well in six weeks; I mean, there would be no pain after that time.

Q. If you bend the knee in a reverse position it might cause that?

A. Well, if you would bend the knee with the foot extended it would be painful to you.

Q. Did you ever have a case before of an injury to the sciatic nerve by external force?

A. Yes, sir; a very unique case of Mr. Van Beber here; it was a very slight injury.

Q. And neither you nor Mr. Van Beber could locate the cause of that?

A. No, sir; we could not account for it in no other way than by his cranking his car and injured the nerve and it caused a degeneration; it is bound to have done it.

Q. You say at first there was a complaint about the chest?

A. Yes, sir; over the heart region.

Q. And now it is the leg?

A. Yes, sir.

Q. Which leg was it, his right or his left leg?

A. His left leg.

37 Q. And which breast, the right or the left breast?

A. The left breast over the heart region.

Q. You didn't find any broken bones or dislocated bones, or any broken skin or contusions?

A. No, sir; we did not find any.

Q. But his condition now leads you to believe that he is suffering from an injury to this sciatic nerve?

A. Yes, sir. Of course, a man can similate pain; we can't tell about that.

Q. You can't tell objectively, you have no way of telling whether a man is suffering pain or not?

A. No, sir.

Q. You have to take his word for that?

A. Yes, sir; but when this degenerated process takes place six months or a year later, we know then that he was not similating pain.

Q. You have made no examination in this case?

A. Yes, sir; I did two or three months ago; I measured the legs and the left leg is an inch and a quarter or an inch and three-eighths smaller than the other one.

Q. Would non-use of that leg have such an effect upon it?

A. Yes, sir; it would, but you would have to put it in a plaster paris cast to cause that. Hobbling around on it would not cause that.

38 Q. You think it wouldn't?

A. Yes, sir; I know it wouldn't.

Further deponent sayeth not.

Testimony of V. Otey.

39 R. L. HANNA, the plaintiff, being recalled for further examination, testified further on his own behalf as follows, to-wit:

Direct examination.

By Mr. Caplinger:

Q. This injury occurred sometime along about the first of January, Mr. Hanna; how long was it after that before you were able to get out and attend to your business in the way of buying stock?

A. Well, I shipped stock along. I kept buying stock, but a fellow, Ben Gatlin, I got him to ride horse back out in the country for me, and he was buying most of the hogs, and I had them sold under a contract and I was buying hogs, and Ben Gatlin would ride out in the co-ntry and locate these hogs and tell them to drive them in and I would buy them and pay for them. There was for a long time that I could not ride horse back. I can ride horseback now some.

Q. You say there was a long time that you could not ride horse back?

A. Yes, sir.

Q. And that you can ride horse-back now some?

A. Yes, sir.

Cross-examination.

By Mr. Frierson:

Q. You are looking after your own affairs now, are you,
40 Mr. Hanna?

A. Yes, sir; I ain't riding very much though. I am riding a little when it is necessary.

Further deponent sayeth not.

41 Thereupon, the defendant, to sustain the issues on its part, offered the following evidence, to-wit:

V. OTEY, being first duly sworn, testified on behalf of the defendant as follows, to-wit:

Direct examination.

By Mr. Frierson:

Q. What is your name?

A. V. Otey.

Q. What is your occupation?

A. I am agent for the railroad company.

Q. At what point?
A. At Harrisburg.
Q. Have you the bill of lading on which Mr. Hanna traveled last January?
A. Yes, sir.
Q. Along about the 9th?
A. Yes, sir.
Q. Will you produce it?
A. Yes, sir.
Q. This is signed by V. Otey and R. L. Hanna; are those the signatures of the gentlemen mentioned?
A. No, sir; they are the signatures of Mr. Smith.
Q. Is that the standard live stock contract in use?
A. Yes, sir.
Q. Is there any other form for shipping live stock used in this section?
42 A. No, sir; not that I know of.

Mr. Frierson: We want to offer this contract in evidence.
Mr. Caplinger: That's objected to, as this is only a copy.

Q. Mr. Otey, have we the original?
A. I think the original was given to Mr. Hanna.
Q. They are all originals; they are made in triplicate, are they?
A. Yes, sir.

The Court: If it is a triplicate made by a carbon sheet it is an original and may be introduced.

Q. Now, Mr. Otey, read there what it says, if anything, about the duties of a person being transported under a live stock contract?

Mr. Caplinger: That's objected to.
The Court: Is that one of the three copies wrote on by Mr. Hanna?
A. Yes, sir.
The Court: Al- right; the objection is overruled.

A. What part do you want me to read?
Q. I want you to read what the parties are to do along here?
A. The party or parties in charge of this stock shall and they hereby agree to observe the following regulations and identify themselves whenever required to do so by any conductor.

1. Remain in the caboose attached to the train drawing said cars while the train is in motion.
2. Get on and off said caboose while the same is still.
43 3. Get on or be on no freight or other cars while switching is being done at stations.
4. Will not walk or stand on any track of stations or other places at night without a lanter-.
5. In consideration of this free return transportation, I hereby agree that in case of any accident, wreck, mishap or other casualty, in which I may or shall receive any personal injury, I will notify

issuing carrier in writing through my home Agent, or other nearest or most convenient Local Agent of said carrier, or the General Superintendent of said carrier, of such injury, and of the time, place, circumstances and extent thereof, and in default of my doing so within thirty days after the happening of such injury, I hereby agree to waive any and all causes and right of action for or on account thereof. And I further agree that I shall not have any cause or right of action, nor maintain any action, for any injury, except that which I shall in said notice as aforesaid advise the said carrier.

Q. Is that a part of that live stock contract?
A. Yes, sir.

44 Cross-examination.

By Mr. Caplinger:

Q. Have you a copy of the bill of lading you issued to Mr. Hanna on the first day of January, 1921, or was this one issued on that date?
A. There is no bill of lading issued for stock; it is a live stock contract.
Q. Well, did you issue him one of these on the first day of January?
A. This is on the 9th.
Q. Well, did you issue him one on the first?
A. I don't know; he may have had one on the first; he shipped several cars of stock.

Further deponent sayeth not.

45 (Said live stock contract is in words and figures as follows, to-wit:)

Exhibit to Otey's Testimony.

Form 1134. Duplicate. 12 19 10M PS.

United States Railroad Administration.

Director General of Railroads.

Missouri Pacific Railroad.

Live Stock Contract.

This agreement executed in triplicate this 9 day of Jan., 1921, at Harrisburg, Ark., by and between the Director General of Railroads, Missouri Pacific Railroad, party of the first part, hereinafter called the carrier, and R. L. Hanna, party of the second part, hereinafter called the shipper, Witnesseth:

That the carrier herein has received from the shipper, subject to the classifications and tariffs in effect on the date of this agreement,

the live stock described below, consigned and destined as indicated below, which the carrier agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination, and it is mutually agreed as to each carrier of all or any of said live stock over all or any portion of said route to destination, and as to each party at any time interested in all or any of said live stock, that every service to be performed, and every liability incurred in connection with said shipment shall be subject to the conditions herein contained, including conditions on back hereof.

46 Consigned to National Live Stock Com. Co.

Destination: National Stock Yards, State of Ill., County of ——.

Route: ——. Car Initials and Numbers: M. P. 51746.

The classifications and tariffs under which this contract is made require, that, for the purpose of applying the lawful rate of freight, the shipper must declare the shipment to be "ordinary live stock", specifying the kind or kinds of animals, or, if not "ordinary live stock", he must declare the kind and value of each animal. This carrier is not a common carrier of live stock of value greater than $800.00 per head, and will not accept shipments for transportation where the declared value is in excess of $800.00 per head. Space for declaration of value is here provided, to-wit:

Number and Description of Animals (Shipper's load and count): 48 cattle.

Shipper's declared Value in Not "Ordinary Live Stock": ——.

Weight (Subject to correction): 22,000.

Rate of Freight per 100 pounds: ——.

Loaded A. M. Jan. 9, 1921.

If charges are to be prepaid, write or stamp here "To be Prepaid."

Acknowledgement to be used if freight is prepaid: Received $— to apply in prepayment of the charges on the property described hereon. —— ——, Agent or Cashier, Per —— ——. (The signature here acknowledges only the amount prepaid.)

In so far as the following conditions (including conditions on the back of this contract) are not contrary to law, it is agreed:

47 First. That the carrier shall not be liable for consequential damage of any kind not reasonably within its contemplation at the time the tariff establishing the rate was filed, notwithstanding any notice brought to its attention at time of shipment.

Second. That the live stock covered by this contract is not to be transported within any specified time, nor delivered at destination at any particular hour, nor in season for any particular market, and in any suit for loss, damage or delay, negligence shall not be presumed or inferred from proof of delay.

Third. That any carrier or party liable on account of loss of or damage to any of said live stock shall have the full benefit of any insurance that may have been effected upon or on account of said live stock, so far as this shall not avoid the policies or contracts of insurance.

Fourth. That the first party is exempted from liability for loss or damage arising from derailments, collisions, fire, escapement from cars, heat, suffocation, overloading, crowding, maiming—or other accident or causes not arising from negligence of the first party.

Fifth. That the second party shall assume all risk and expense of feeding, watering, bedding, and otherwise caring for the Live Stock covered by this contract while in cars, yards, pens, or elsewhere, and shall load and unload the same at his own expense and risk.

Sixth. That the first party is exempted from liability for
48 loss or damage caused by any mob, strike, or threatened or actual violence to persons or property from any source.

Seventh. The second party will notify, in writing, the nearest station agent or general officer of one of the carriers concerned, regarding any loss or injury, from delat or otherwise, of the Live Stock covered by this contract, in time to enable said agent or officer to examine said stock before it is removed from the unloading pens or mingled with other stock; that if claim is to be presented for said loss or injury, written notice to that effect will be filed with the agent at point of origin or destination within 95 days, and verified itemized claim within 125 days, after the loss or injury occurred; and that a failure to comply with the provisions of this section shall be a bar to recovery for such loss or injury.

Eighth. That this contract does not entitle the holder thereof, or any other person to ride on any train except for the purpose and in accordance with the conditions printed on the back hereof, all of which are agreed to be a part of this contract; nor to ride in the cars of any train except that in which the live stock covered by this contract is transported, nor to return transportation from destination of Live Stock to point of origin, unless this contract is presented within — days from the date hereof to the properly authorized agent of the first party for return transportation that such transportation, properly obtained as above, shall be used within 24 hours after date and hour issued, by such person or persons only
49 whose names are written therein and who actually accompanied the Live Stock for the purpose of caring therefor, and shall not include women, infants, or other persons unable to perform the services of caring for Live Stock in transit, as required by this contract; and persons entitled to return transportation under the terms of this contract shall perform the journey within — days from the date of return transportation.

Ninth. That the person or persons in charge of the Live Stock covered by this contract, shall remain in the caboose car attached to the train, while the same is in motion, or about to be put in motion, and that when-ver such person or persons shall leave the caboose or pass over or along the cars, or track, they shall do so at their own risk or personal injury from every cause whatever, and that the said first party shall not be required to stop or start its train or caboose cars, from depots or platforms, or to furnish lights for the accom-da-ion or safety of such persons. That the second party will

hold the first party harmless from any and all claims for injuries to persons accompanying said live-stock, as aforesaid, resulting from the first party's negligence or otherwise, and will indemnify it for any damages and expenses it may be required to pay by reason thereof, or any expenses it may be put to, or damages it may be required to pay by reason of the introduction of said Live Stock into a country, or State, against the quarantine or other laws of the United States, or of any State, people or community.

Tenth. That the second party hereby releases and waives
50 any and all causes for action for damages that may have accrued to said second party by any written or verbal contract prior to the execution hereof.

Eleventh. That no suit or action against the first party, or any connecting carrier, for loss, damage or delay to any of the Live Stock shipped under this contract shall be sustainable in any Court of law or equity, unless such suit or action is commenced on or before the next day after the expiration of two years from the date the cause of action accrued; and, should any suit or action be commenced after the expiration of said period, the lapse of time shall be conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

Twelfth. That no person other than the owner of the stock shipped, or his duly authorized agent in the name of the owner, shall be allowed to sign this contract. That the evidence that the said second party, after fully understanding and accepting all the terms, covenants and condition of this contract, including the printed rules and regulations on the back hereof, and that they all constitute a part hereof, fully assents to each and all of the same, in his signature hereto.

No agent of this carrier has any authority to waive, modify, or amend any of the provisions of this contract, or to agree to ship said cars by any particular train, or to reach any particular market, or furnish any particular kind of cars, or to furnish cars on any particular day, which the carrier hereby expressly declines to
51 do. Director General of Railroads, by V. Otey, As Agent Missouri Pacific Railroad. R. L. Hanna, As Shipper, Second Party Herein. Witness: —— ——. To be other than either of the contractors.

Agent must promptly transmit this copy of Freight Claim Agent, St. Louis, Mo.

(On the back of this Live Stock Contract the following appears, to wit:)

Notice.

At points specified below contracts will be surrendered and drover's tickets issued in -ieu thereof:

St. Louis, Mo. (See Note) General Freight Office, 816 Railway Exchange Building, East St. Louis, Ill., Agent, National Stock Yards, Kansas City, Mo., General Live Stock Office and Local Agent,

South Omaha, Neb., Local Agent. Chicago, Ill., General Agent, 208 South La Salle Street. St. Joseph, Mo., General Agent and Local Agent. Wichita, Kan., Local Agent and Joint Agent Union Stock Yards.

At other points of destination, the Local Agent will execute the Live Stock Contract in the space herein provided for return transportation.

NOTE.—Drover's tickets should be obtained from the Agent at Tower Grove Station, St. Louis, Mo., on Sundays and Legal Holidays.

The transportation must be carefully filled out by the
52 Agent at destination, when presented by parties who accompanied the Live Stock, and who are entitled to return transportation according to tariffs, after plainly writing across the face of the contract "Delivery Effected," and provided Conductor's Certificate shows that attendant accompanied stock to station at which transportation is validated.

Drover's Transportation Issued by United States Railroad Administration.

Director General of Railroads.

Missouri Pacific Railroad.

Good for Continuous Transportation Only.

Transport R. L. Hanna from Harrisburg, Ark., to Nat'l Stk. Yds., Ills.

This transportation is not transferable, and must be presented to the train conductor for continuous transportation, within 24 hours after date and honor of issue. Alexander Robertson, Federal Manager, St. Louis, Mo. Date of Issue 1/9, 1921. Hour of 9 A. M. Witness: ——— ———. Countersigned: Director General of Railroads, by V. Otey.

As a means of identification, the Agent issuing this transportation will require each person to write his name in the space below, and will cancel the lines not required, by drawing a pen through them.

If this transportation is found in the hands of any person other than those whose names are written below, the conductor will take up and collect full fare.

53 Any person accepting or riding on this transportation thereby and hereby agrees to assume all risks to persons or baggage except for the wilful or active negligence of the carrier.

....
....

Contract No. —.

United States Railroad Administration.

Director General of Railroads.

Missouri Pacific Railroad.

Live Stock Contract.

The party or parties in charge of this stock shall and they hereby agree to observe the following regulations and identify themselves whenever required to do so by any conductor.

1. Remain in the caboose attached to the train drawing said cars while the train is in motion.
2. Get on and off said caboose while the same is still.
3. Get on or be on no freight or other cars while switching is being done at station.
4. Will not walk or stand on any track at stations or other places at night without a lantern.
5. In consideration of this free return transportation, I hereby agree that in case of any accident, wreck, mishap or other casualty, in which I may or shall receive any personal injury, I will notify issuing carrier in writing through my home Agent, or other nearest or most convenient Local Agent of said carrier, or the Gen-
54 eral Superintendent of said carrier, of such injury, and of the time, place, circumstances and extent thereof, and in default of my so doing within 30 days after the happening of such injury, I hereby agree to waive *and* and all causes and right of action for or on account thereof. And I further agree that I shall not have any cause or right of action, nor maintain any action, for any injury, except that of which I shall in said notice as aforesaid advise the said carrier.
6. Said carrier will receive the usual amount of baggage and check and transport same on its regular passenger trains, but said carrier expressly refuses to receive such baggage on trains hauling said stock, as it has no facilities for caring for same, and if the party or parties in charge of stock elect to take any baggage along with them in the caboose or other cars on stock train, they retain exclusive custody and care thereof and assume all risk of loss of same or damage thereto from whatsoever cause arising, including the negligence of said carrier and that of its servants and agents, and said parties are warned that said carrier will exercise no care whatever over said baggage on stock trains. —— ——, Em-
55 ployees of Shipper.

Transport on freight trains drawing car as specified in contract: —— ——, Employees of Shipper. —— ——, Agent Missouri Pacific Railroad.

Instructions to Agents.

The published Tariffs of this carrier contain certain provisions for the transportation of men in charge of Live Stock and the return of them, and this blank form must be used except as authorized by the Tariffs. When return transportation is not authorized by Tariffs, the blank spaces under head of "Drover's Transportation" must be cancelled by agent who issues contract, drawing lines in ink through them.

NOTE.—Agents will make contracts in triplicate, numbering consecutively for each year, giving original to shipper and forwarding duplicate to the Freight Claim Agent, St. Louis, Mo. Triplicate filed by Agent.

Special Instructions to Conductors.

Conductors will require all persons presenting this contract to identify themselves by writing their names on the lines under heading "For Identification Signature," and compare such signatures with the signature as written on lines 1, 2, and 3, *unheard*
heading "Live Stock Contract," in order to make certain
56 that the transportation is being used by the proper parties.

Conductors must certify from and to what station attendant accompanied the Stock, and on what train, in spaces provided under heading "Certificate."

Certificate.

This is to certify that: Attendant, Mr. —— ——, has accompanied the Live Stock described in attached contract and handled in trains shown below: From —— to—— Train No. —. ——, Conductor. Date: ——. From —— to ——. Train No. —. ——, Conductor. Date: ——. From —— to ——. Train No. —. ——, Conductor. Date: ——. From —— to ——. Train No. —. ——, Conductor. Date: ——.

Freight conductors must fill in the spaces provided for above in all cases when shippers or other employees are in charge of stock; also show date and points between which attendants were in charge.

When destination of Stock Contract is on conductor's run and is not good for return transportation, Conductors will punch contract, list same on Form 316 and return with other transportation
collected to Auditor Passenger Receipts. When contract is
57 good for return transportation, last Conductor honoring on return trip will lift contract, insert his punch in same, list on Form 316 and return to Auditor Passenger Receipts.

For Identification Signature.

....

....

Agents Must Fill Out This Form.

Car numbers.	Initials.	Way bills. Series.	Way bills. No.	Draw line from top down to No. of cars in shipment.
51746	M.P.	L.	35	20 19 18 17 16 15 14 13 12 11 10 9 8 **7** 6 5 4 3 2 (1)

Number of cars on contract.

NOTE.—Agents will punch description of party accompanying stock. If shipment consists of more than five cars and more than one attending accompanies it, the description of each must be punched.

Agents not furnished with a punch will cross out descriptions with ink.

58 Description of Party in Charge Accompanying.

Number of men in charge....	(One.)	Two.	Three.
Age:——			
Size	0	0	0 Slim.
	0	0	0 Medium.
	0	0	0 Stout.
Height	0	0	0 Tall.
	0	0	0 Medium.
	0	0	0 Short.
Hair	0	0	0 Light.
	0	0	0 Gray.
	0	0	0 Dark.
	0	0	0 Red.

Number of men in charge....	(One.)	Two.	Three.
Beard	0	0	0 Mustache.
	0	0	0 Chin.
	0	0	0 Side.
	0	0	0 Full Beard.
	0	0	0 None.

Punch to indicate number of men with shipment, or mark with pen and ink.

59 R. D. WILSON, being first duly sworn, testified on behalf of the Defendant as follows, to-wit:

Direct examination.

By Mr. Frierson:

Q. What is your name?
A. My name is R. D. Wilson.
Q. What is your occupation?
A. Freight conductor.
Q. On what railroad?
A. On the Missouri Pacific.
Q. A suit is brought here by Mr. R. L. Hanna on account of injuries alleged to have been received by falling from a caboose at Gale, Illinois, on the night of January 9th, last: Do you remember of Mr. Hanna falling there?
A. I remember he told me he fell off the train.
Q. Did you see him fall?
A. No, sir; I did not.
Q. Had you told Mr. Hanna, or not, to get off of that train before it stopped?
A. I told him if we stopped on the hill—They have to stop there and cut off the engine and caboose, and I said, "If we stop on the hill there, you can get off; otherwise you won't have time to eat," and I said, "I believe we are going to stop at the hill," as we were slowing down, and when he — taken the slack and went on down, I
60 said, "No they are not going to," and as we passed the yard office I had to get off and register the train in, and I said, "Now, don't get off her-; they will stop down there by the bridge."
Q. How far is the bridge from there?
A. Possibly it is one hundred yards.
Q. What time of night was that?
A. It was about nine or ten o'clock.
Q. Did Mr. Hanna say anything to you about falling?
A. After I registered my train in I came down out of the office into the eating house and heard them talking, and I heard Mr. Hanna say he lost his pocket book and he lost it when he fell, and we went out and found it, and he said he found it where he fell. That is all I know about his falling.

Q. Did he make any complaint there about your telling him to get off and misleading him?

A. No, sir.

Q. Did he say anything to you about it afterwards?

A. Well, afterwards I met him on the train and he said he was hurt that night; and I asked him his name and was going to make a report of it, and he said he was not hurt and would not make any complaint, that if he got paid every time he fell down he would not have to work.

61 Q. Where was that conversation?

A. It was at Gale that night while they were eating.

Cross-examination.

By Mr. Caplinger:

Q. Mr. Hanna was a passenger on your train, was he?

A. Yes, sir; riding on a stock-man's pass.

Q. And you didn't know he had fallen off of your train?

A. No, sir.

Q. And you didn't tell them to get off at the yard house, or if they got off it would save them walking back?

A. No, sir; I told them not to get off. That is our duty to see that they don't get off while the train is moving.

Q. Did anybody else get off besides Mr. Hanna?

A. I don't know; I was the first one that got off and went up-stairs. I didn't know that Mr. Hanna had gotten off.

Q. What other passengers were on that caboose?

A. I can't recall their names; one of them lives here and one at Monette.

Q. And Mr. Hanna and yourself were the only four on the caboose at that time?

A. No, sir; we had a hind brakeman.

Q. Is he here?

62 A. Yes, sir.

Q. When you started to get off, Mr. Wilson, did you see them standing around the door?

A. Yes, sir; that was my object in telling them not to get off of the train.

Q. Did they have their suit cases with them?

A. I could not say.

Q. And you told them not to get off of the train until it stopped?

A. Yes, sir; I am positive of that.

Q. And you didn't see anybody get off?

A. No, sir.

Redirect examination.

By Mr. Frierson:

Q. What was it you said about the train stopping on the side of the hill?

A. I said, in pulling into Gale where the condition is such that we can't get the train in the yard we stop on the hill and cut the engine off and then pull the train on down in the yard and cut the caboose off and change cabooses there and pull on out.

Q. What was the name of this hind brakeman?

A. I could not tell you; I have lost my reports.

Q. Was he in the caboose?

A. Well, I presume he was. He had no business to be anywhere else.

63 Q. What part of the caboose was he in?

A. I don't know; he might have been in any part of it; he might have been in the cupolo, or he might have been standing there with them.

Q. And all you know about him being there is that he was supposed to be there?

A. Yes, sir; he is supposed to be there to protect the hind end of the train.

Q. Where was he when you pulled into Gale that night?

A. He was in the caboose.

Q. What part of the caboose?

A. I don't know; probably he was in the cupalo.

Q. As a matter of fact, the only impression you have is that he was in the caboose?

A. Yes, sir; if he had been out, I would have had to have sent him back to flag a train, and I didn't do that. I don't remember where he was, but it was his duty to be there, and I have no reason to believe that he was not with it.

Recross-examination.

By Mr. Caplinger:

Q. You didn't go any further with that train, did you?

A. No, sir.

Q. You don't know what condition Mr. Hanna was in after he left there.

A. No, sir; I don't know anything about it.

Further deponent sayeth not.

64 J. E. Arnold, being first duly sworn, testified on behalf of the Defendant as follows, to-wit:

Direct examination.

By Mr. Frierson:

Q. What is your name?

A. J. E. Arnold.

Q. Where do you live, Mr. Arnold?

A. I live at Monette, Arkansas.

Q. In what county?

A. Craighead County.
Q. What is your occupation?
A. Farming.
Q. Were you on the Missouri Pacific train at Gale, Illinois, last January, when Mr. Hanna fell; do you remember that occurrence?
A. Yes, sir; I was on the train when he said he fell.
Q. Did you see him fall?
A. No, sir.
Q. Where was he at the time you understood he fell?
A. I was going from the train to the yard office, there.
Q. Had the conductor gotten off, or was he still in the caboose?
A. The conductor got off just ahead of me.
Q. Could you see the ground as you stepped off of the caboose?
A. Yes, sir; but I had a flash light though.
65 Q. Was tha- train going rapidly or not?
A. No, sir; it was not going very fast.
Q. Did the conductor tell you or the other passengers to get off of that train?
A. I never heard him, if he did.
Q. What were you getting off for?
A. To keep from walking from the upper yards.
Q. Had you ever been there before?
A. Yes, sir.
Q. Do you remember of ever jumping off of a caboose there before?
A. No, sir; I don't remember that I had.
Q. You had walked from the upper yards before?
A. Yes, sir; one time.
Q. Did you talk to Mr. Hanna after he came back to the yard office there about this occurrence?
A. Yes, sir; he came in the office where I was and said he had fell, I believe, he missed his pocket book before or after we ate, anyway, he missed his pocket book and I taken the flash light and went back with him and we found it.
Q. Did he say anything about how the accident occurred?
A. No, sir; only he said he started to get off and fell.
Q. Did he say anything about the conductor telling him to get off, or misleading him?
A. No, sir; I don't remember it, if he did.
Q. You have said that you didn't hear the conductor say anything about getting off at the yard office?
66 A. When we run into the south yards I asked the conductor if we were going to stop there and he said he didn't know, and they slowed down and then started up again and he said, "No. they ain't," and he got down on the running board and stepped off and turned into the yard office, and when he got off I followed him and went across to the office and knew nothing about Mr. Hanna getting hurt until he came into the office.
Q. You made a statement that I am going to show you, when the matter was a good deal fresher in your mind than it is no*t*, I will get you to look over it for the purpose of refres-ing your recol-

lection, (handing witness a paper). Is that what occurred there—I show you a statement and ask you if that is your signature?

A. Yes, sir; that is mine.

Q. Now, this is rather long; I will look over it and ask you a question or two. Here it is, "Mr. Hanna stated——"

Mr. Caplinger (interrupting): That's objected to.

A. No answer.

Q. Did Mr. Hanna state to you at the time that the reason he fell was because he held too high on the grab irons and that is what caused him to fall?

A. I don't recollect. It is like I say, I don't recollect much about it. We talked about the affair and I believe he told me he caught hold of the grab iron on the side of the caboose and when he
67 stepped off he held to this one and the other one hit and knocked him over against the track.

Q. Now, I will ask you this question: February 28th last is a signed statement by you, "Mr. Hanna stated at the time——"

Mr. Caplinger (interrupting): That's objected to as being leading.

The Court: Ain't that right?

Mr. Frierson: I want to read him what he says here and ask him if that refreshes his memory.

The Court: I think you may do that.

Mr. Caplinger: Note our exceptions.

A. No answer.

Q. "Mr. Hanna stated at the time he held too high on the grab iron and that caused him to fall, and the time we got back after eating is the first time he complained of being hurt." Now, do you remember whether or not Mr. Hanna made that statement to you about the grab irons?

A. I think we talked that conversation over.

Q. Well, do you remember now of his telling you the reason he fell then; you say you talked that conversation over?

A. Yes, sir.

Q. What do you mean by that?

A. That he held too high on the grab iron there; that was after we got back on the train and was talking about it.

68 Q. Is that your recollection now?

A. Yes, sir.

Cross-examination.

By Mr. Caplinger:

Q. What was Mr. Hanna's condition after you got on the other train?

A. Well, we all ate supper and got on the other train and got out of Gale. I believe, it was after we got out of Gale he got sick and went to the rear of the caboose and vomited.

Q. Did he vomit more than once or not?
A. I don't remember.
Q. Did he lay down any?
A. Yes, sir; he was pretty sick.
Q. Did he lay down all the way to St. Louis?
A. I don't remember.
Q. Who else was on the caboose you got off of there besides yourself and Mr. Hanna?
A. Mr. Haste.
Q. And was the conductor on?
A. Yes, sir.
Q. Any one else?
A. I don't believe the brakeman was on.
Q. If he had been on there you would have seen him, wouldn't you?
A. Well, I don't know; he could have been in the top of it, but I don't remember his being on there. He had been on, Bu- I
69 don't remember whether he was on there yet or not when we got to the eating shack.
Q. But you didn't see him?
A. No, sir.
Q. Where were you standing or sitting in the caboose?
A. I was in the rear end.
Q. Where was the cupalo?
A. Well, it could be at either end.
Q. Well, where was it in this caboose?
A. Well, I could not say. As well as I recollect, I believe it was at the front end going north.
Q. Well, when the conductor got off and you got off right behind him the conductor said, "You had better get off if you are going to," didn't he?
A. Yes, sir; when I passed around here he went into the eating house and said, "If you are going to get off you had better get off," or something to that effect.
Q. That all happened about the same time, didn't it?
A. Yes, sir.
Q. He got off and went into the eating house?
A. Yes, sir.
Q. And you followed him into the eating house?
A. No, sir; I went in ahead of him.
Q. He didn't tell you not to get off, did he?
A. I didn't hear him if he did.
70 Q. Well, you would have heard it if he had said it, wouldn't you; he talks pretty loud, doesn't he?
A. Yes, sir; he asked me if I could get off.
Q. He didn't tell you not to get off?
A. No, sir.

Redirect examination.

By Mr. Frierson:

Q. Did you get off because anybody told you to?
A. I got off to keep from walking from the upper yards back there.
Q. Did the conductor order or command you — of there?
A. No, sir.
Q. Did he command or order anybody else off of there?
A. Not any more than what I said.
Q. What was it you said?
A. I got off right in front of the eating house door and run around him there and as well as I remember he said, "You had better get off if you are going to." There is a culvert or bridge right north of there, and I don't think he missed that a great ways, from where his pocket book was laying.
Q. If Mr. Hanna had stayed on there any longer would he have jumped off into that culvert?
A. If he had stayed on until the caboose got there, he would have gotten off in it.
Q. Was that statement made while the conductor was on the ground there.
71 A. Yes, sir.

Recross-examination.

By Mr. Caplinger:

Q. You folks were talking to each other just before you got to the yard house, weren't you?
A. Yes, sir.
Q. Was anything said there about the yard being dark and some one being knocked in the head there any time a day or two before that?
A. I don't remember that.
Q. You don't remember that?
A. No, sir; I never heard it.

Redirect examination.

By Mr. Frierson:

Q. Mr. Arnold, there is a question about the absence of the rear brakeman that has come into this case; you say you don't remember him; Conductor Wilson testified a few minutes ago that he was on there but he doesn't remember where he was. Has Conductor Wilson, or any body else communicated with you on the subject of that rear brakeman being on there?
A. I don't think so.

Q. Well, have I, or has anybody else mentioned that to you before you gave your testimony?

A. No, sir; this morning is the first time I have seen that conductor since that night.

72 Recross-examination.

By Mr. Caplinger:

Q. You say you have had quite a little experience in shipping stock and riding on that kind of a train; when they are getting into a yard like that the brakeman hardly ever sits up there and keeps waiting while the others are getting off, do they?

A. Well, I don't know. You know that there are some of them carry their bedding and do their cooking on the caboose.

Further deponent sayeth not.

The defendant rests.

73 Thereupon the Plaintiff to further maintain the issues on his part, offered the following evidence in rebuttal, to-wit:

JOE HASTE, being recalled for further examination, testified further on behalf of the Plaintiff, as follows, to-wit:

Direct examination.

By Mr. Caplinger:

Q. Mr. Haste, I don't believe I asked you on direct examination awhile ago whether the conductor told you not to get off; Did he tell you at any time to stay on, not to get off?

A. If he did, I didn't hear it.

Q. You would have been likely to hear it, wouldn't you, if he had said it; he talks rather loud, don't he?

A. Yes, sir.

Cross-examination.

By Mr. Frierson:

Q. You would not jump or step off of the caboose after Mr. Arnold stepped or jumped off, you said you would not risk it; why wouldn't you?

A. Well, I was afraid I could not make it safe.

Q. Could you see at all?

A. How is that?

74 Q. How fast was the train moving at the time?

A. I could not say how fast it was going.

Q. Why was it you would not get off after those other two men got off?

A. Well, I ain't in the habit of getting off of the train until it stops.

Q. Could you see the ground?
A. Part of the time I could, and part of the time I couldn't.
Q. You refused to get off before Mr. Hanna did get off, didn't you?
A. Yes, sir.

Redirect examination.

By Mr. Carlinger:

Q. You saw Mr. Hanna get off and fall, didn't you?
A. Yes, sir.

Further deponent sayeth not.
The plaintiff rests.
This was all of the evidence introduced by either party upon the trial of the above entitled cause.

75 Thereupon the Defendant requested the Court to give to the jury its instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9. The Court refused to give said instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9, as requested by the Defendant, to which ruling of the Court in refusing to give its said instructions the Defendant at the time jointly and severally excepted and asked that its exceptions be noted of record, which was accordingly done.

Said instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9, as requested by the Defendant, are in words and figures as follows, to-wit:

In Circuit Court of Poinsett County.

Defendant's Requested Instructions.

1.

You are instructed to find for the defendant.

To the refusal of the Court to give its said instruction numbered 1, the Defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.

2.

You are instructed that the burden of proof is upon the plaintiff to maintain the allegations of his complaint by a preponderance of the evidence, by which is meant the greater weight and degree of credible testimony, and if plaintiff should fail to establish the material allegations of his complaint by such greater weight and degree of credible evidence, your verdict shall be for the defendant.

76 To the refusal of the Court to give its said instruction numbered 2, the Defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.

3.

If you find from the evidence that the plaintiff was injured by reason of an accident which occurred without negligence or fault either on his part or on the part of the employees of defendant, plaintiff is not entitled to recover.

To the refusal of the Court to give its said instruction numbered 3, the defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.

4.

The conductor of the freight train from the caboose of which plaintiff stepped at the time he fell was not under any duty to remain on the caboose for the purpose of preventing plaintiff from stepping off the same.

To the refusal of the Court to give its said instruction numbered 4, the Defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.

5.

You are not entitled to indulge in surmise or conjecture, but your consideration of this case and your verdict should be based upon evidence adduced during the trial.

To the refusal of the Court to give its said instruction numbered 5, the Defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.

77

6.

In arriving at your verdict you will confine your attention to allegations of negligence contained in the complaint and referred to in the evidence.

To the refusal of the Court to give its said instruction numbered 6, the Defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.

7.

If you find from the evidence that plaintiff stepped off the caboose at the time and place mentioned in the complaint.

The above instruction being incomplete was withdrawn by the Defendant at the time of the trial.

8.

If you find that alighting from a moving caboose at the time and place mentioned in the complaint was dangerous but the danger

would be as easily observed and known by the plaintiff as by the employee of defendant in charge of said caboose, your findings should be for the defendant.

To the refusal of the Court to give its said instruction numbered 8, the Defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.

9.

You are instructed that carriers of passengers are not liable for injuries happening to passengers, unfor-seen accidents where there has been no negligence, and therefore if you find that plain-
78 tiff was injured by reason of an unfor-seen accident but without negligence on the part of defendant or its employees, your verdict should be for the defendant.

To the refusal of the Court to give its said instruction numbered 9, the Defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.

In Circuit Court of Poinsett County.

Instructions of the Court.

Thereupon the Court of its own motion, and over the objections of the Defendant, gave to the jury instructions numbered 1, 2, 3, 4, 5, 6, and 7. To the giving of said instructions numbered 1, 2, 3, 4, 5, 6, and 7, by the Court of its own motion, over the objections of the Defendant, the Defendant at the time jointly and severally excepted, and asked that its exceptions be noted of record, which was accordingly done.

Said instructions numbered 1, 2, 3, 4, 5, 6, and 7, as given by the Court of its own motion, are in words and figures as follows, to-wit:

1.

The plaintiff sues the Defendant and alleges that he was a passenger on defendant's train and while such passenger at Gale, Illinois, while in or approaching the yards of the defendant the defend-
ant's conductor in charge of said train advised the plaintiff
79 to alight or get off of said train at the yard office, and that the plaintiff in attempting to get off of said train was injured and that said injury was due to the negligence of defendant's conductor in advising him to alight from said train on which he was a passenger at the yard office aforesaid.

The defendant denies that its conductor advised the plaintiff to alight from the train at the yard office aforesaid; and states by way of further defense that plaintiff was advised by said conductor not to alight from said train and that it is not liable, and that plaintiff was injured through his own negligence.

To the giving of said instruction numbered 1 by the Court of its own motion, the defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.

2.

If you find from a preponderance of the evidence that upon approaching or while in or near the yards of the defendant at Gale, Illinois, the conductor in charge of said train of defendant advised the plaintiff to alight or get off of said train at the yard office, and if you further find that plaintiff acted upon the advice of said conductor and attempted to alight from said train and that in attempting to alight from said train he was in the exercise of due care for his own safety, and if you further find that the plaintiff was injured in alighting from said train and falling you will find for
80 the plaintiff; and unless you find for the plaintiff under this instruction your verdict will be for the defendant.

The defendant objected to the giving of said instruction numbered 2 by the Court of its own motion for the reason that the instruction assumes that the conductor was acting within the scope of his authority, and for the further reason that it assumes as a matter of law that if the conductor invited the plaintiff to alight at the time and place and under the circumstances mentioned in the evidence it fixed liability, the defendant contending that whether or not such invitation by the conductor constituted negligence is a question for the jury.

The Court overruled the objections of the Defendant and gave said instruction to the jury, to which ruling of the Court in giving its said instruction numbered 2 to the jury, the Defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.

3.

You are further instructed that notwithstanding you may find that the conductor in charge of defendant's train advised the plaintiff to alight from said train at its yard office in Gale, Illinois, you are further instructed that it was the duty of plaintiff to exercise due care for his personal safety in attempting to alight from or get off of said train, and if you find that plaintiff failed to exer-
81 cise such care as herein told you he cannot recover and your verdict will be for the defendant.

To the giving of said instruction numbered 3 by the Court of its own motion, the Defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.

4.

You are instructed that notwithstanding you may find that plaintiff was advised to get off at its yard office by defendant's conductor yet if you find that it should have appeared to the plaintiff in the

exercise of due care for his own personal safety that to attempt to alight from said train would probably result in plaintiff's injury then you will find for the defendant.

To the giving of said instruction numbered 4 by the Court of its own motion, the Defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.

5.

Due care is such care as persons of ordinary care and prudence usually take under like and similar circumstances.

To the giving of said instruction numbered 5 by the Court of its own motion, the Defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.

6.

If you find for the plaintiff the measure of damages will be for the injury suffered, for loss of time and earning capacity
82 already suffered and which he may suffer by reason of the injury, and for mental and physical pain and suffering caused by said injury.

To the giving of said instruction numbered 6 by the Court of its own motion, the Defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.

7.

The burden of proof is upon the plaintiff to prove all of the material allegations of his complaint by a preponderance of the evidence.

To the giving of said instruction numbered 7 by the Court of its own motion, the Defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.

These were all of the instructions requested by either party, or given by the Court of its own motion, upon the trial of the above entitled cause.

83 In Circuit Court of Poinsett County.

Verdict.

Thereupon the jury, after hearing the instructions of the Court and the argument of counsel, retired to consider of their verdict, and after mature deliberation returned into open court with the following verdict, to-wit:

"We, the jury, find for plaintiff in the sum of $2,000.00. T. W. Sparks, Foreman."

And thereafter on the — day of December, A. D. 1921, the same being a regular day of the Decembe., 1921, Term of the Poinsett

Circuit Court, sitting in the First Division thereof, the Defendant herein filed its motion for a new trial, which said motion is in words and figures as follows, to-wit:

84 In the Circuit Court of Poinsett County, Arkansas, First Division, December Term, 1921.

[Title omitted.]

Motion for New Trial.

Comes the defendant herein, Missouri Pacific Railroad Company, and moves the Court to set aside the verdict of the jury and judgment of the Court rendered thereon, and grant it a new trial, and for cause says:

1st. The verdict of the jury is contrary to the evidence.

2. The verdict of the jury is contrary to the law.

3. The verdict of the jury is contrary to both the law and the evidence.

4. The verdict of the jury is not supported by the evidence.

5. The Court erred in giving to the jury, over the objection of the defendant, instruction numbered 1 of its own motion; and erred in refusing to modify same as requested by defendant.

85 6th. The court erred in giving to the jury, over the objection of the defendant, instruction numbered 2 of its own motion.

7th. The Court erred in giving to the jury, over the objection of the defendant, instruction numbered 3 of its own motion.

8th. The Court erred in giving to the jury, over the objection of the defendant, instruction numbered 4 of its own motion.

9th. The Court erred in giving to the jury, over the objection of the defendant, instruction numbered 5 of its own motion.

10th. The Court erred in giving to the jury, over the objection of the defendant, instruction numbered 6 of its own motion.

11th. The Court erred in giving to the jury, over the objection of the defendant, instruction numbered 7 of its own motion.

12th. The Court erred in refusing to give to the jury instruction numbered 1, as requested by the defendant.

13th. The Court erred in refusing to give to the jury instruction numbered 3, as requested by the defendant.

86 14th. The Court erred in refusing to give to the jury instruction numbered 3, as requested by the defendant.

15th. The Court erred in refusing to give to the jury instruction numbered 4, as requested by the defendant.

16th. The Court erred in refusing to give to the jury instruction numbered 5, as requested by the defendant.

17th. The Court erred in refusing to give to the jury instruction numbered 6, as requested by the defendant.

18th. The Court erred in refusing to give to the jury instruction numbered 7, as requested by the defendant.

19th. The Court erred in refusing to give to the jury instruction numbered 8, as requested by the defendant.

20th. The Court erred in refusing to give to the jury instruction numbered 9, as requested by the defendant.

Wherefore, Defendant prays that it be granted a new trial herein. Gordon Frierson, Attorney for Defendant.

87 In Circuit Court of Poinsett County.

Order Overruling Motion for New Trial.

And thereafter on the same day said motion for a new trial heretofore filed herein came on to be heard, and the Court, after hearing the argument of Counsel, and after reading said motion, and after being fully advised in the premises, doth overrule said motion for a new trial, to which ruling of the Court the Defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.

In Circuit Court of Poinsett County.

Order Allowing Appeal.

And thereafter on the same day the Defendant herein prayed an appeal of this cause to the Supreme Court of the State of Arkansas, which was by the Court granted, and Defendant was allowed One Hundred and Twenty (120) Days in which to prepare, present and file its Bill of Exceptions herein.

88 In Circuit Court of Poinsett County.

Reporter's Certificate.

STATE OF ARKANSAS,
2nd Judicial District, ss:

I, Vernon S. Sharp, Official Court Stenographer within and for the Second Judicial District of Arkansas, duly appointed, qualified and acting, do hereby certify that the annexed and foregoing pages, numbered One (1) to Seventy-six (76), both inclusive, contain a full, true, perfect, correct and complete transcript of all of the proceedings had during the trial of the above entitled cause.

In Witness Whereof, I have hereunto set my hand on this the 24th day of February, A. D. 1922. Vernon S. Sharp, Official Court Stenographer, 2nd Judicial District of Arkansas.

89 In Circuit Court of Poinsett County.

Order Settling Bill of Exceptions.

And now comes the Defendant and presents this as its Bill of Exceptions herein to the Judge of the Court trying said above entitled cause, in vacation, and prays that the same be by the Judge signed and approved, and the Judge, after examination, doth sign and approve said Bill of Exceptions, and doth order that the same be by the Clerk filed and made a part of the record herein.

In Witness Whereof, I have hereunto set my hand on this the 8th day of April, A. D. 1922. J. M. Futrell, Judge 2nd Judicial District of Arkansas.

90 **Clerk's Certificate.**

STATE OF ARKANSAS,
County of Poinsett, ss:

I, T. T. Mardis, Clerk of the Circuit Court in and for the County and State aforesaid, do hereby certify that the foregoing eighty-six pages of typewriting contain a true and complete transcript of the record and proceedings in the Circuit Court of said County, in the cause therein stated.

Witness my hand as such Clerk and the seal of said Court, this 2d day of May, 1922. T. T. Mardis, Circuit Clerk. (Seal.)

91 **Fee Bill.**

Poinsett County Circuit Court.

No. 1810.

R. L. HANNA, Plaintiff,
vs.
MISSOURI PACIFIC RAILROAD COMPANY, Defendant.

Certificate of Costs.

1. Clerk's Cost	$8.65
2. Sheriff's Cost	2.45
3. Making Transcript	6.00
4. Witness Fee	3.00
Total	$20.10

STATE OF ARKANSAS,
County of Poinsett, ss:

I, T. T. Mardis, Clerk of the Circuit Court for the County and State aforesaid do hereby certify that the above and foregoing page

of typewritten matter is a true and correct statement of the cost in the above entitled cause in the Poinsett Circuit Court.

Witness my hand and the seal of said Court this the 2d day of May, 1922. T. T. Mardis, Circuit Clerk. (Seal.)

92 [File endorsement omitted.]

93 **Argument and Submission.**

STATE OF ARKANSAS, *ss:*

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House, in the City of Little Rock, on the 27th day, being the fourth Monday of November, A. D. 1922, amongst others, were the following proceedings, to-wit: On the 15th day of January, A. D. 1923, a day of said term:

MISSOURI PACIFIC RAILROAD COMPANY, Appellant,

vs.

R. L. HANNA, Appellee.

Appeal from Poinsett Circuit Court.

This cause being regularly called, come the parties thereto by their attorneys, and said cause is submitted upon the transcript of the record and the briefs filed and is by the court taken under advisement.

94 In Supreme Court of Arkansas, November Term, 1922.

[Caption omitted.]

Judgment.

January 29, 1923.

This cause came on to be heard upon the transcript of the record of the circuit court of Poinsett County, First Division, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things, affirmed with costs.

It is further considered that said appellee recover of said appellant all his costs in this Court in this cause expended, and have execution thereof.

95 In the Supreme Court of Arkansas, January 29, 1923.

No. 130.

[Titled omitted.]

Opinion.

HUMPHREYS, *J.*:

Appellee instituted suit against appellant in the Poinsett circuit court to recover damages in the sum of $2,000.00, on account of injuries received in alighting from its train at Gale, Illinois, through the alleged negligent act of its conductor in inviting and advising him to get off at that place. It was alleged that appellee was, at the time, accompanying a shipment of stock from Harrisburg, Arkansas, to St. Louis, Missouri, and in obedience to the advice of the conductor did alight from said train, with the result that he was thrown to the ground and seriously and permanently injured; that, at the time, it was so dark he could not tell how fast the train was moving and in debarking acted solely upon the advice of appellant's employee.

Appellant filed an answer admitting that appellee was a passenger upon said train, accompanying a stock shipment to St. Louis, but denied all other material allegations in the complaint. Appellant also interposed the following defenses:

First, contributory negligence on the part of appellee in alighting from a moving train.

96 Second, the written contract for transportation which required the appellee to remain in the caboose, attached to the train, while the train was in motion, and to get on and off the caboose while the same was still.

The cause was submitted to the jury upon the pleadings, testimony, and instructions of the court which resulted in a verdict and judgment against appellant in the sum of $2,000.00. From that judgment an appeal has been duly prosecuted to this court.

Appellee, plaintiff below, introduced testimony to the effect that early in January, 1921, he shipped two car loads of cattle, and one car load of hogs to St. Louis, Missouri, from Harrisburg, Arkansas; that he accompanied the live stock, riding by right as a passenger in the caboose; that when they were getting into Gale, Illinois, the conductor told the passengers to get off at the yard house and it would save them from walking through the dark yards; that it was then about nine o'clock and dark; that all of them got their baggage and followed the conductor to the door for the purpose of debarking; that while standing in the door, the conductor again told them to get off; that the conductor got off first, J. E. Arnold next, and appellee next, who, by reason of the rapid movement of the train, was thrown violently to the ground, some twelve feet distant, and in-

jured; that at the time he stepped off he thought the train was barely moving.

Appellant introduced testimony to the effect that the con-
97 ductor told the passengers, if the train stopped at the hill to get off so they would have time to eat; that the train was slowing down and the conductor remarked, "I believe we are going to stop at the hill"; that the engineer took slack and started down the hill, whereupon the conductor told the passengers not to get off until they reached the bridge, about one hundred yards below the yard house; that the conductor, himself, got off at the yard house in order to register the train in; that Arnold succeeded in getting off safely but that appellee fell in the attempt to do so. Appellant also introduced the bill of lading for the shipment of the live stock upon which appellant traveled, which contained a provision to the effect that the party in charge of the stock should remain in the caboose attached to the train while in motion, and to get on and off the caboose while the same was still.

Appellant's main contention for reversal is that according to the undisputed facts, appellee was injured while attempting to debark from a moving train in violation of his contract for transportation. In support of this contention appellant cites the case of Illinois Central Railroad v. Jennings, 229 Ill. 608, which decided that such a stipulation was valid. Conceding that the liability is determinable by the law of the State where the injury occurred and that the Supreme Court of Illinois has upheld the validity of such a clause in a transportation contract as being reasonable and just, the con-
98 tract and adjudication, upholding its validity, have no bearing upon or application to the instant case. This suit is not for a breach of the contract, but for an injury resulting from an alleged negligent act of appellant's employee. The action is outside of the contract. It is based upon the maxim, "respondeat superior," which imputes liability to a master for the negligent acts of his servant, within the scope of the servant's actual or apparent authority, irrespective of any contract. 4 R. C. L. Sec. 596.

Appellant's next and last contention for reversal is, that the court erred in giving instruction No. 2, which is as follows:

"If you find from a preponderance of the evidence that upon approaching, or while in or near the yards of the defendant at Gale, Illinois, the conductor in charge of said train of defendant, advised the plaintiff to alight or get off of said train at the yard office, and if you further find that plaintiff acted upon the advice of said conductor and attempted to alight from said train and that in attempting to alight from said train he was in the exercise of due care for his own safety, and if you further find that the plaintiff was injured in alighting from said train and falling, you will find for the plaintiff; and unless you find for the plaintiff under this instruction your verdict will be for the defendant."

The instruction is assailed because it assumed that the conductor acted within the scope of his authorityif he advised appellee to

get off of a moving train at the yard house; and if such
99 advice was given, that it constituted negligence as a matter of law.

(1). The conductor was in command of the train and necessarily possessed authority to direct passengers when and where to get off. His own testimony reveals that he had such authority. In instructing the jury it was, therefore, proper for the court to assume that he was acting within the scope of his authority if he directed appellee to debark at the yard house.

(2). It is also proper to assume, in instructing the jury, that if the conductor directed appellee to get off of a moving train which threw him violently to the ground in the attempt to debark, that it was a negligent act as a matter of law. The general law is that a carrier owes a passenger the highest degree of care, consistent with the practical operation of its trains, 2 Hutchinson on Carriers (3rd. Ed.) Sec. 1118, and to direct a passenger in the night time to debark from a moving train without furnishing ample means and protection for doing so, is clearly a violation of this duty, amounting in the law to negligence. Jones v. Chicago, M. & St. P. R. Co., 42 Minn. 183; Eddy v. Wallace, 49 Fed. 801; Lake Erie & W. R. Co. v. Huffman, 97 N. E. 434.

The issue of contributory negligence on the part of appellee in debarking from the moving train was submitted to the jury under proper instructions.

No error appearing, the judgment is affirmed.

100 November Term, 1922.

(Caption omitted.)

February 12, 1923.

The appellant having filed a petition for rehearing within the time allowed by law, and duly served the same, now prays for two weeks time in which to file a supporting brief, which time is by the Court granted.

November Term, 1922.

(Caption omitted.)

February 26, 1923.

Petition for rehearing having been filed within the time allowed by law, and the same having been duly served, said petition is now submitted with the response and briefs filed, and is by the Court taken under advisement.

101 In the Supreme Court of the State of Arkansas.

[Title omitted.]

Petition for Rehearing.

[Filed Feb. 12, 1923.]

Comes the appellant, Missouri Pacific Railroad Company, and petitions the Court to set aside the judgment rendered herein and to grant it a re-hearing, and for grounds therefor, states:

I.

That the Supreme Court erred in holding and deciding that the following provisions in the Live Stock Contract, or bill of lading, were not valid defense to appellee's cause of action to-wit:

Paragraph 9 of the written contract between appellant and appellee provides:

"That the person or persons in charge of the Live Stock covered by this contract, shall remain in the caboose car attached to the train, while the same is in motion, or about to be put in motion, and that whenever such person or persons shall leave the caboose or pass over or along the cars, or track, they shall do so at their own risk or personal injury from every cause whatever, and that the said first party shall not be required to stop or start its train or caboose cars, from depots or platforms, or to furnish lights for the accommodation or safety of such persons. That the second party will hold the first party harmless from any and all claims for injuries to person accompanying said Live Stock, as afore-
102 said, resulting from the first party's negligence or otherwise, and will indemnify it for any damages and expenses it may be required to pay by reason thereof, or any expenses it may be put to, or damages it may be required to pay by reason of the introduction of said Live Stock into a country, or State, against the quarantine or other laws of the United States, or of any State, people or community."

And the further provision in said Contract which provides:

"No agent of this carrier has any authority to waive, modify, or amend any of the provisions of this contract, or to agree to ship said cars by any particular train, or to reach any particular market, or furnish any particular kind of cars, or to furnish cars on any particular day, which the carrier hereby expressly declines to do."

And the further provision:

"The party or parties in charge of this stock shall and they hereby agree to observe the following regulations and identify themselves whenever required to do so by any conductor.

1. Remain in the caboose attached to the train drawing said cars while the train is in motion.
2. Get on and off said caboose while the same is still."

II.

The Supreme Court erred in holding and deciding that this cause should not be determined by the law of the State of Illinois, where it is alleged plaintiff received his injuries, and in accordance with the decision of the Supreme Court of Illinois in the case of Illinois Central Railroad Company v. Jennings, 229 Ill. 608.

III.

That the Court erred in holding and deciding that this
103 is not a suit for "breach of the contract," but for "an injury resulting from an alleged act of appellant's employee."

IV.

That the Supreme Court erred in holding that "The conductor was in command of the trains and necessarily possessed authority to direct passengers when and where to get off," and that the conductor thereby had the authority to "waive, modify, or amend any of the provisions of the contract."

V.

That the Court erred in holding and deciding that the provisions in said contract which were violated by the appellee did not constitute a defense to appellee's alleged cause of action.

VI.

That the Court erred in holding and deciding that the general law applicable to passengers and carriers should be applied under the facts in this case, and that the appellee's alleged cause of action should be determined thereby.

VII.

That the Court erred in not holding and deciding that the
104 only law applicable was the Interstate Commerce Act which requires the carrier to file its tariffs and contracts for the transportation of shipments in interstate commerce with the Interstate Commerce Commission, and that under said law the provisions in said contract, limiting the liability of the carrier, were valid, and constituted a valid defense to appellee's alleged cause of action. Respectfully submitted, Thos. B. Pryor, Gordon Frierson, Attorneys for Appellant.

STATE OF ARKANSAS,
County of Sebastian, ss:

I, Thos. B. Pryor, do hereby certify that I am of counsel for the appellant in the above cause and that in my opinion, the grounds stated in the above and foregoing petition for re-hearing are well taken, and that said petition for re-hearing is not filed for the purpose of delay, but that justice may be done the appellant. Thos. B. Pryor.

Subscribed and sworn to before me this 8th day of February, 1923. F. H. Fennessy, Notary Public. My Commission expires January 12, 1924.

[File endorsement omitted.]

105 In Supreme Court of Arkansas, November Term, 1922.

(Caption omitted.)

Order Overruling Petition for Rehearing.

March 5, 1923.

Being fully advised the petition for rehearing heretofore filed in this cause, is by the Court overruled.

106 **Clerk's Certificate.**

STATE OF ARKANSAS, *ss:*

In the Supreme Court.

I, W. P. Sadler, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Missouri Pacific Railroad Company, Appellant, vs. R. J. Hanna, and also of the opinion of the Court rendered therein, as the same appears on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this March 29, 1923. W. P. Sadler, Clerk Supreme Court of Arkansas, By J. H. Campbell, Deputy Clerk. [Seal of the Supreme Court of Arkansas.]

WRIT OF CERTIORARI AND RETURN—Filed July 12, 1923

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Being informed that there is now pending before you a suit in which Missouri Pacific Railroad Company is appellant, and R. L. Hanna is appellee, which suit was removed into the said Supreme Court by virtue of an appeal from the Circuit Court of Poinsett County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[File endorsements omitted.]

IN THE UNITED STATES SUPREME COURT

[Title omitted]

STIPULATION

It is hereby agreed and stipulated by and between counsel for the petitioner and counsel for the respondent that the record now on file in this court attached to application for writ of certiorari in the above case shall be treated and considered as the record in the case, and that the Clerk of the Supreme Court of Arkansas may attach a copy of this stipulation to his return on writ of certiorari in lieu of attaching a copy of the entire record.

Witness our hands this 7 day of July, 1923.

Edward J. White, Thos. B. Pryor, Attorneys for Petitioner.
Arthur L. Adams, A. B. Coplinger, I. M. Greer, Attorneys for Respondent.

STATE OF ARKANSAS, *ss:*

IN THE SUPREME COURT

I, William P. Sadler, Clerk of the Supreme Court of the State of Arkansas, do hereby certify that the above and foregoing is a true and perfect copy of the stipulation filed in this office in the case of Missouri Pacific Railroad Company, Petitioner, v. R. L. Hanna, Respondent.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of Little Rock, this the 10th day of July, 1923.

William P. Sadler, Clerk Supreme Court of Arkansas, by J. H. Campbell, Deputy Clerk. [Seal of the Supreme Court of Arkansas.]

[File endorsement omitted.]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

MISSOURI PACIFIC RAILROAD COMPANY (Appellant Below)..... Petitioner

vs. No. 313

R. L. HANNA (Appellee Below)..... Respondent

STATEMENT

Writ of certiorari was granted by this Court directed to the Supreme Court of Arkansas.

The facts are stated in the opinion of the Supreme Court of Arkansas as follows:

> "Appellee instituted suit against appellant in the Poinsett Circuit Court to recover damages in the sum of $2,000.00, on account of injuries received in alighting from its train at Gale, Illinois, through the alleged negligent act of its conductor in inviting and advising him to get off at that place. It was alleged that appellee was, at the time, accompanying a shipment of stock from Harrisburg, Arkansas, to St. Louis, Missouri, and in obedience to the advice of the conductor did alight from said train, with the result that he was thrown to the ground and seriously and permanently injured; that, at the time, it was so dark he could not tell how fast the train was moving and in debarking acted solely upon the advice of appellant's employee.
>
> Appellant filed an answer admitting that appellee was a passenger upon said train, accompanying a stock shipment to St. Louis, but denied all other material allegations in the complaint. Appellant also interposed the following defenses:

First, contributory negligence on the part of appellee in alighting from a moving train.

Second, the written contract for transportation which required the appellee to remain in the caboose, attached to the train, while the train was in motion, and to get on and off the caboose while the same was still.

The cause was submitted to the jury upon the pleadings, testimony, and instructions of the court which resulted in a verdict and judgment against appellant in the sum of $2000.00. From that judgment an appeal has been duly prosecuted to this court.

Appellee, plaintiff below, introduced testimony to the effect that early in January, 1921, he shipped two car loads of cattle, and one car load of hogs to St. Louis, Missouri, from Harrisburg, Arkansas; that he accompanied the live stock, riding by right as a passenger in the caboose; that when they were getting into Gale, Illinois, the conductor told the passengers to get off at the yard house and it would save them from walking through the dark yards; that it was then about nine o'clock and dark; that all of them got their baggage and followed the conductor to the door for the purpose of debarking; that while standing in the door, the conductor again told them to get off; that the conductor got off first, J. E. Arnold next, and appellee next, who, by reason of the rapid movement of the train, was thrown violently to the ground, some twelve feet distant, and injured; that at the time he stepped off he thought the train was barely moving.

Appellant introduced testimony to the effect that the conductor told the passengers, if the train stopped at the hill to get off so they would have time to eat; that the train was slowing down and the conductor remarked, "I believe we are going to stop at the hill"; that the engineer took slack and started down the hill, whereupon the conductor told the passengers not to

get off until they reached the bridge, about one hundred yards below the yard house; that the conductor himself, got off at the yard house in order to register the train in; that Arnold succeeded in getting off safely but that appellee fell in the attempt to do so. Appellant also introduced the bill of lading for the shipment of the live stock upon which appellant traveled, which contained a provision to the effect that the party in charge of the stock should remain in the caboose attached to the train while in motion, and to get on and off the caboose while the same was still." (R. 44-45.)

The contract of transportation was signed by the respondent (R. 22), and was a "drover's pass," with which the respondent was familiar as he had been engaged in shipping cattle over the same route for twelve years. (R. 9.)

The contract of transportation contained this further provision:

"No agent of this carrier has any authority to waive, modify or amend any of the provisions of this contract." (R. 22.)

ASSIGNMENTS OF ERROR

The Supreme Court of Arkansas erred in holding:

I.

That the contract of transportation had no bearing upon the question of liability, and that its provisions did not constitute a defense.

II.

That the rule of "respondeat superior" applied, regardless of the provisions of the pass upon which the plaintiff was riding.

III.

That the violation of the provisions of the contract did not constitute a defense to plaintiff's alleged cause of action.

BRIEF OF THE ARGUMENT

The Supreme Court of Arkansas refused to consider the provisions in the drover's pass which required the respondent to remain in the caboose while the same was in motion, and to "get on and off said caboose while the same is still," as a defense to plaintiff's cause of action for his alleged injuries sustained while getting off the caboose in violation of this provision of the pass upon which he was riding.

This Court has repeatedly considered stipulations of a similar nature as having bearing upon and applications to such cases. Drovers' passes are permitted under the same clause of the Interstate Commerce Act as are other passes, and, as to such other passes, this Court has not only considered such stipulations, but has sustained them as complete defenses.

K. C. S. Ry Co. v. Van Zant, (Jan. 2, 1923).

Charleston Railway Co. v. Thompson, 234 U. S. 576.

Boering v. Chesapeake Beach R.R. Co., 193 U. S. 442.

Northern Pacific R.R. Co. v. Adams, 192 U. S. 440.

The Act of Congress itself provides:

> "No common carrier subject to the provisions of this Act shall, after January first, Nineteen Hundred and Seven, directly or indirectly issue or give any interstate free ticket, free pass or free transportation for passengers, except * * * to necessary caretakers of live stock * * * ."

And in the case of K. C. S. Ry. Co. v. Van Zant, *supra*, this Court said:

> "The provision for passes, with its sanction in penalties, is a regulation of interstate commerce to the

completion of which the determination of the effect of passes is necessary. We think, therefore, free passes in their entirety are taken charge of,—not only their permission and use, but the limitations and conditions upon their use. Or, to put it in another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of the responsibility the railroad incurs by their issuance, and the extent of the right the person to whom issued acquires, are taken charge of."

And the Court further said, after referring to other cases:

"Those cases were considered and applied as giving validity to the stipulations in passes issued under the Act in Charleston & W. C. R.R. Co. v. Thompson, 234 U. S. 576, according thereby freedom of transportation to the possessors of a pass, and giving assurance to the railroad company that its gratuity will not be given the consequences of compensated right and its incident obligations, and be a means of exacting from the company indefinite damages. * * * The pass proceeded from the Federal Act; it is controlled necessarily in its incidents and consequences by the Federal act, to the exclusion of state laws and state policies, and such is the effect of the cited cases."

The stipulations in such passes are to be tried according to the Act of Congress and the decisions of the Federal Court.

G. F. & A. Ry. Co. v. Blish Milling Co., 241 U. S. 190.

N. O. & N. E. R.R. v. Harris, 247 U. S. 367.

N. O. & N. E. R.R. v. Scarlett, 249 U. S. 528.

Charleston Ry. v. Thompson, 234 U. S. 576.

The pass for a caretaker of live stock, being included

in the same clause of the Interstate Commerce Act as other permissible passes, is to be considered as a "free" pass within the meaning of the Act, and is to be governed according to the Act and the decisions of this Court.

This Court in Charleston & W. C. R.R. Co. v. Thompson, *supra*, referring to such passes said:

> "To most of those enumerated, the pass would be gratuitous in the strictest sense, and when all that may receive them are grouped in a single exception, we think it plain that the statute contemplates a pass as gratuitous and in the same sense to all."

The transportation was interstate, and the stipulation was known to the respondent. In violating the stipulation he was injured. The stipulation expressly provided that no agent had authority to alter, to change, or modify its terms.

The Supreme Court of Arkansas erred in holding that the stipulation was abrogated by the suggestion of the conductor of the train, and that the suit was not for "breach of the contract," but was based upon the maxim "respondeat superior," which imputes liability to a master for the negligent acts of his servant.

The Circuit Court of Appeals for the Eighth Circuit, in the case of Smith v. Atchison, Topeka & Santa Fe Railroad Co., 194 Fed. 79, where the facts were similar to the facts in this case said:

> "The contract is by its terms tied to the tort, and the same law should be applied to the one as to the other."

In the case of Illinois Central Railroad Co. v. Jennings, 229 Ill. 608, in which the same question was involved as in this case, the Court said:

> "Appellee's testimony to the effect that the conductor was in charge of the train and was giving

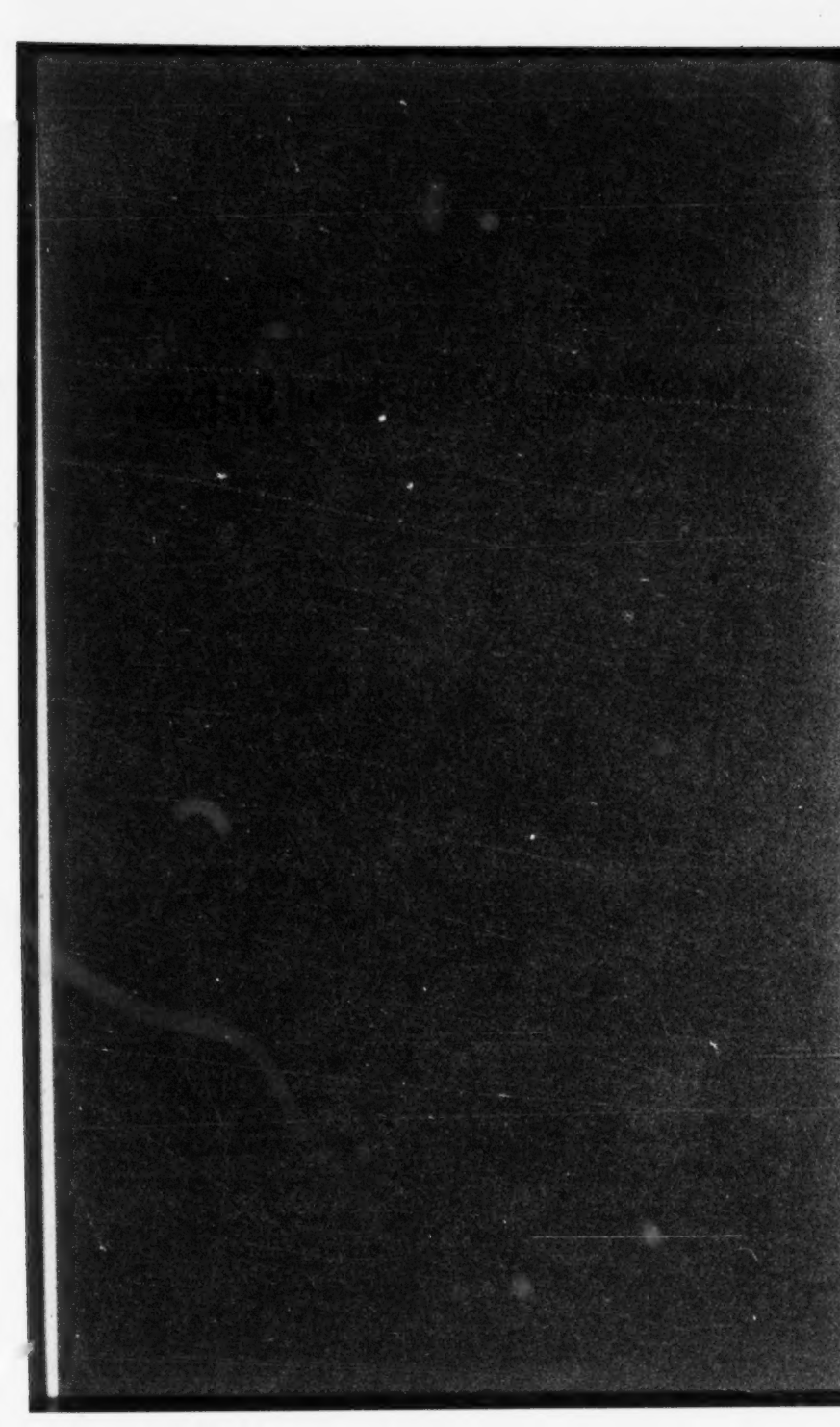
orders in connection with the train, and had authority over the train does not tend to show that the conductor had apparent authority to alter the written contract or waive the provisions thereof by which appellee was required to ride in the caboose."

We respectfully submit that there is an irreconcilable conflict in the decisions of this Court, the Circuit Court of Appeals, the Supreme Court of Illinois, holding that such stipulations in passes are valid and binding, and the holding of the Supreme Court of Arkansas in this case to the effect that such a stipulation is not a defense, and that the judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

EDWARD J. WHITE,
THOMAS B. PRYOR,
Counsel for Petitioner.

[redacted]



IN THE

Supreme Court of the United States

(OCTOBER TERM, 1923.)

MISSOURI PACIFIC RAILROAD COMPANY, (Appellant Below), PETITIONER,

VS.

R. L. HANNA (Appellee Below), RESPONDENT.

No. 313.

BRIEF FOR RESPONDENT.

STATEMENT.

The statement of facts as quoted from the opinion of the Supreme Court of the State of Arkansas and set out in the brief for petitioner, is correct.

In the petition for writ of *certiorari* to the Supreme Court of Arkansas and the brief in support of petition, counsel for petitioner attempted to quote from the opinion of the Supreme Court of Arkansas and, in doing so, omitted an important part of the opinion. Below is an exact quotation showing the omitted part in italics:

"Appelant's main contention for reversal is that according to the undisputed facts, appellee was injured while attempting to debark from a moving train in violation of his contract for transportation. In support of this contention appellant cites the case of Illinois Central Railroad Co. v. Jennings, 229 Ill., 608, 82 N. E. 403, which decided that such a stipulation was valid. Conceding that the liability is determinable by the law of the State where the injury occurred, and that the Supreme Court of Illinois has upheld the validity of such a clause in a transportation contract as being reasonable and just, the contract and adjudication, upholding its validity, have no bearing upon or application to the instant case. This suit is not for a breach of the contract, *but for an injury resulting from an alleged negligent act of appellant's employee. The action is outside of the contract.* It is based upon the maxim *respondeat superior*, which imputes liability to a master for the negli-

gent acts of his servant, within the scope of the servant's actual or apparent authority, irrespective of any contract. 4 R. C. L., Sec. 596."

Brief of the Argument.

I.

The Interstate Commerce Act of Congress was not brought into question, nor was any federal issue raised in the trial court.

There is nothing in the record to make it appear that such an issue was raised. Petitioner relies solely on the refusal of the trial judge to instruct the jury to find for the defendant to support the claim that a federal issue was raised.

It has been uniformly held by the Supreme Court of Arkansas that questions of whatever nature, not raised and properly preserved for review in the trial court, will not be noticed on appeal.

Brown v. Wilkes, 153 Ark., 545;
Phoenix Cement Sidewalk Co. v. R. W., etc., Co,. 101 Ark., 22;
Jones v. Seymour, 95 Ark., 593;
Price v. Greer, 89 Ark., 300;
Felsberg v. Moore, 84 Ark., 399.

In Jones v. Seymour *et al.*, *supra*, the court says:

> "The object of requiring the parties to present all questions and issues to the lower court before they can be presented to this court is to have the lower court pass thereon so that this court upon appeal may determine whether or not such ruling was erroneous. The purpose is also in furtherance of justice to require the party to first present the question he contends for in the lower court, so that the other party may not be taken by surprise."

This court has repeatedly held that one who desires to save his right of review by the federal Supreme Court must raise the federal question on which he relies in the trial court.

> Willoughby v. Chicago, 235 U. S. 45;
> Zayas v. Lothrop, 231 U. S. 171;
> Rosenthal v. N. Y., 226 U. S., 260;
> Cincinnati, N. O. & T. P. R. Co. v. Slade, 216 U. S., 78.

A federal question was not even raised on appeal to the Supreme Court of Arkansas. At that time appellants urged that the law of Illinois governed, and the opinion of the court shows that the case was submitted and decided on that issue. It

does not appear that the Interstate Commerce Act was mentioned or any federal issue called to the attention of the Supreme Court of Arkansas until appellant presented its petition for re-hearing to that court. But it is too late to raise the question for the first time in a petition for re-hearing after judgment has been rendered by the State Court.

Jett Bros. Dist. Co. v. Carrollton; 252 U. S. 1;
Mergenthaler Linotype Co. v. Davis, 251 U. S. 256;
GodChaux Co. Inc. v. Estopinal, 251 U. S., 179;
Bilby v. Stewart, 246 U. S. 255.

The Arkansas Supreme Court refused to consider the petition for re-hearing and declined to pass on the federal issue which had not been presented in proper time.

Petitioner has no right to ask a review by the Supreme Court of the United States where the state appellate court declines to consider the question.

Anderson v. Durr, 42 S. Ct., 15.
Cox v. Texas, 202 U. S., 446.

Chicago, etc. R. Co. v. McGuire, 196 U. S., 128.

In Anderson v. Durr, *supra*, the court held that where re-hearing is denied without giving any reasons, the contention must be regarded as having come too late to raise a question for review by the Federal Supreme Court.

Where a writ of *certiorari* has been granted and it appears that the question upon which the *certiorari* was prayed was not before the court below, the writ of *certiorari* should be dismissed.

Anderson v. Durr, 42 S. Ct., 15.
Houston Oil Co. v. Goodrich, 245 U. S., 440.
Tyrrell v. Dist. of Columbia, 243 U. S., 1.
Furness v. Yang-Tsze Ins. Assn., 242 U. S., 430.
Hartford L. Ins. Co. v. Johnson, 249 U. S., 490.

We therefore submit that petitioner has no right to ask a review in this case and respectfully urge that the writ of *certiorari* should be dismissed.

II.

If this court should refuse to dismiss the writ of *certiorari* heretofore granted, then we respectfully urge that the Supreme Court of Arkansas did not commit any of the errors assigned by petitioner.

Petitioner claims as a defense that respondent is not entitled to recover because when injured, he was traveling on a free pass issued pursuant to the terms of a live stock contract in which he had released the carrier from all liability for any personal injury which he might sustain, thus bringing his claim within the authority of the following cases:

K. C. S. Ry. Co. v. Van Zant, (Jan. 2, 1923).

Charleston Ry Co. v. Thompson, 234 U. S., 576.

Boering v. Chesapeake B. R. R. Co., 193 U. S., 442.

N. Pac. R. R. Co. v. Adams, 192 U. S., 440.

In the cases cited by petitioner to support its contention, the persons injured were traveling on a free pass and were held to be gratuitous passengers. In each of these cases passes were issued by

reason of the relation of the passenger to the railroad company.

The case at bar comes within the rule laid down by this court in the case of New York C. R. Co. v. Lockwood, 17 Wall., 357, 384, 21 L. Ed., 627. 641, in which case it was decided that a person traveling on a "drover's pass" issued upon a live stock contract precisely similar in its terms to that which we have in this case, was a passenger for hire, and that a release from liability for injuries caused by the carrier's negligence was void because a common carrier could not lawfully stipulate for such exemptions.

This decision was rendered in 1873, and has been frequently approved:

Norfolk Southern R. Co. v. Chatman, 244 U. S., 276.

Geo. N. Pierce Co. v. Wells, F. & Co., 236 U. S., 278.

Santa Fe P. & P. R. Co. v. Grant Bros. Constr. Co., 228 U. S., 177.

Tripp v. Michigan C. R. Co., 238 Fed., 449.

In Norfolk Southern R. Co. v. Chatman, *supra*, the court said that the Lockwood case "must be regarded as establishing a settled rule of policy".

Commenting on the Interstate Commerce Act, this court further said:

> "It results that the 'settled rule of policy' established by the Lockwood case, and the decisions following it, must be considered unmodified by the Act to Regulate Commerce; that the plaintiff in charge of his stock, traveling upon a pass permitted to be issued by that act was a passenger for hire."

It is also contended by petitioner that the Supreme Court of Arkansas refused to consider the provisions in the Drover's Pass which required the respondent to remain in the caboose while the same was in motion, and to get on and off said caboose while the same was still, as a defense to plaintiff's cause of action.

The Supreme Court of Arkansas in passing upon this contention said:

> "Conceding that the liability is determinable by the law of the State where the injury occurred, and that the Supreme Court of Illinois has upheld the validity of such a clause in a transportation contract as being reasonable and just, the contract and adjudication, upholding its validity, have no bearing upon

or application to the instant case. This suit is not for breach of the contract, but for an injury resulting from an alleged negligent act of appellant's employee. The action is outside of the contract. It is based upon the maxim *respondeat superior,* which imputes liability to a master for the negligent acts of his servant, within the scope of the servant's actual or apparent authority, irrespective of any contract."

In this opinion the court was in direct accord with the Lockwood case and the late case of Norfolk Southern R. Co. v. Chatman, cited above, and correctly held that defendant could not escape liability for a negligent act of itself or its employee by pleading a provision of the contract.

It was further contended by petitioner that the conductor in charge of said train upon which the respondent was a passenger, had no authority to waive the conditions in the contract. In support of this contention petitioner relies on the case of Illinois Central Railroad Co. v. Jennings, 229 Ill., 608. In that case the court held that "it rested upon the plaintiff to affirmatively show that it was within an apparent scope of the authority of the conductor to waive the benefit of the con-

tract'' and that proper proof of such authority was not made.

In the present case the court held that the proof on this issue was sufficient and in passing on this question said:

> 'The conductor was in command of the train, and necessarily possessed authority to direct passengers when and where to get off. His own testimony reveals that he had such authority.''

We respectfully submit that no federal question was raised or considered, either in the trial court or in the Supreme Court of Arkansas, and for that reason, the writ of *certiorari* should be dismissed.

We further submit that the decision of the Supreme Court of Arkansas is not in conflict with the decisions of this court, the Circuit Court of Appeals or the Supreme Court of Illinois, and that the judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

ARTHUR L. ADAMS,

Counsel for Respondent.

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No. [redacted]54

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1922.

MISSOURI PACIFIC RAILROAD CO.,
(Appellant Below) ..... Petitioner

vs.

R. L. HANNA (Appellee Below) ..... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT OF PETITION.

EDWARD J. WHITE,
THOMAS B. PRYOR,
Counsel for Petitioner.

American Printing Company, Fort Smith, Ark.

IN THE

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(Appellant Below) ..... Petitioner

vs.

R. L. HANNA (Appellee Below) ..... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT OF PETITION.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Missouri Pacific Railroad Company, in support of this, its application for writ of certiorari to be directed to the Supreme Court of Arkansas, respectfully shows:

That on the 5th day of March, 1923, a final judgment was duly entered by the Supreme Court of Arkansas affirming a judgment entered by the State Circuit Court of Poinsett County of the State of Arkansas, in a suit wherein R. L. Hanna was plaintiff, and the Missouri Pacific Railroad Company was defendant. Said suit was for damages on account of personal injuries received by said R. L. Hanna while riding on a pass on the railroad of the defendant, Missouri Pacific Railroad Company, in the State of Illinois. Suit was instituted for $2000.00, and judgment was rendered for that amount.

Petitioner files herewith a certified copy of the record in said cause, marked Exhibit "A."

Petitioner submits the following statement of facts setting up the question involved:

On January 1, 1921, the respondent, R. L. Hanna, shipped a car of live stock over the petitioner's railroad from Harrisburg, Arkansas, to National Stock Yards, Illinois. He accompanied said shipment as a caretaker, riding in the caboose. He was transported on a drover's pass, which contained the stipulations hereinafter set out. When the train reached the town of Gale, in the State of Illinois, the respondent undertook to alight from the caboose while the same was in motion, and in doing so fell and was injured.

He instituted suit in the Circuit Court of Poinsett County, Arkansas, to recover damages resulting from said injuries.

The respondent testified that the conductor in charge of the train upon which he was riding "advised" him to alight from the caboose while same was in motion, and that upon the advice of said conductor he did undertake to alight, and in consequence was injured.

Petitioner, in the trial court, introduced in evidence the drover's pass upon which respondent was riding. This pass was printed upon the bill of lading, and showed a signed acceptance by the respondent. Said pass contained the following stipulations, to-wit:

> "That the person or persons in charge of Live Stock covered by this contract, shall remain in the caboose car attached to the train, while same is in motion, or about to be put in motion, and that whenever such person or persons shall leave the caboose or pass over or along the cars, or track, they shall do so at their own risk or personal injury from every cause whatever, and that the said first party shall not be required to stop or start its train or caboose cars, from depots or platforms, or to furnish lights for the accommodation or safety of such persons. That the second party will hold the first party harmless from any and all claims for injuries to persons accompanying said Live Stock, as aforesaid, resulting from the first party's negligence or otherwise, and will

indemnify it for any damages and expenses it may be required to pay by reason thereof, or any expenses it may be put to, or damages it may be required to pay by reason of the introduction of said Live Stock into a country, or State, against the quarantine or other laws of the United States, or of any State, people or community."

And the further provision, to-wit:

"No agent of this carrier has any authority to waive, modify, or amend any of the provisions of this contract, or to agree to ship said cars by any particular train, or to reach any particular market, or furnish any particular kind of cars, or to furnish cars on any particular day, which the carrier hereby expressly declines to do."

And the further provision:

"The party or parties in charge of this stock shall and they hereby agree to observe the following regulations and identify themselves whenever required to do so by any conductor.

"1. Remain in the caboose attached to the train drawing said cars while the train is in motion.

"2. Get on and off said caboose while the same is still."

The trial judge refused an instruction to find for the defendant, and gave the following instruction:

"If you find from a preponderance of the evidence that upon approaching or while in or near the yards of the defendant at Gale, Illinois, the conductor in charge of said train of defendant advised the plaintiff to alight or get off of said train at the yard office, and if you further find that plaintiff acted upon the advice of said conductor and attempted to alight from said train, and that in attempting to alight from said train he was in the exercise of due care for his own safety, and if you further find that the plaintiff was injured in alighting

from said train and falling you will find for the plaintiff, and unless you find for the plaintiff under this instruction your verdict will be for the defendant."

There were other instructions given, but the same are not material on this petition.

The jury by its verdict settled the question of fact as to whether or not the conductor had advised the plaintiff to alight from the caboose. As to the contract of transportation introduced in evidence, no question was raised as to its authenticity or correctness, nor was there any contention that he was ignorant of its terms.

The Supreme Court of Arkansas, in disposing of this contention on the part of defendant said:

> "Appellant's main contention for reversal is that, according to the undisputed facts, appellee was injured while attempting to debark from a moving train, in violation of his contract for transportation. In support of this contention, appellant cites the case of Illinois Central Railrad Co. v. Jennings, 229 Ill. 608, which decided that such a stipulation was valid. Conceding that the liability is determinable by the law of the State where the injury occurred, and that the Supreme Court of Illinois has upheld the validity of such a clause in a transportation contract as being reasonable and just, the contract and adjudication upholding its validity have no bearing upon or application to the instant case. This suit is not for breach of contract. It is based upon the maxim "respondeat superior," which imputes liability to a master for the negligent acts of his servant, within the scope of the servant's actual or apparent authority, irrespective of any contract. R. C. L., Vol. 4, Sec. 596."

A petition for rehearing was filed in the Supreme Court of Arkansas, and it was urged upon the Court that under the Interstate Commerce Act of Congress a passenger riding upon a pass is bound by the provisions contained in the pass. The Supreme Court of Arkansas overruled the petition for rehearing, and adhered to its former decision that pas-

sengers riding upon a pass are not bound by the provisions contained in the pass, although said forms of passes are on file with the Interstate Commerce Commission as a part of its tariff.

Your petitioner contends that the Supreme Court of Arkansas erred in not reversing the judgment of the Circuit Court of Poinsett County, Arkansas, and that such error in the decision of the Supreme Court of Arkansas is in conflict with the Act of Congress known as the Interstate Commerce Act, approved February 4, 1887, as amended by the Act of June 29, 1906, and in conflict with the decisions of this Court construing said Act of Congress, and also in conflict with the decisions of the Supreme Court of Illinois in the case of Illinois Central Railroad Company v. Jennings, 229 Ill. 608, which decided that such a stipulation was valid and binding.

WHEREFORE, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Court directed to the Supreme Court of Arkansas, commanding said Court to certify and send to this Court on a date certain, to be therein designated, a full and complete transcript of the record, and the proceedings of said Supreme Court in said cause, therein entitled "Missouri Pacific Railroad Company, Appellant, v. R. L. Hanna, Appellee," and Numbered in said Supreme Court of Arkansas 1810, to the end that said cause may be reviewed and determined by this Court, as provided by the provisions of the Act of Congress known as the Judicial Code, and by the amendments thereto, including that of September 6, 1916, and that this petitioner may have other and further relief in the premises as to this Court may seem appropriate and in conformity with the said Act of Congress, and that the judgment in said Supreme Court of Arkansas in said cause, and every part thereof, may be reversed by this Honorable Court.

EDWARD J. WHITE,
THOMAS B. PRYOR,
Counsel for Petitioner.

BRIEF

Petitioner submits that the Supreme Court of Arkansas erred in holding that the contract for transportation had no application to or bearing upon the question of its liability.

Petitioner shows that this Court has repeatedly considered stipulations of a similar nature as having bearing upon and applications to such cases. Drovers' passes are permitted under the same clause of the Interstate Commerce Act as are other passes, and, as to such other passes, this Court has not only considered such stipulations, but has sustained them as complete defenses.

K. C. S. Ry. Co. v. Van Zant, (Jan. 2, 1923).
Charleston Railway Co. v. Thompson, 234 U.S. 576.
Boering v. Chesapeake Beach R.R. Co., 193 U.S. 442.
Northern Pacific R.R. Co. v. Adams, 192 U.S. 440.

The Act of Congress itself provides:

> "No common carrier subject to the provisions of this Act shall, after January first, Nineteen Hundred and Seven, directly or indirectly issue or give any interstate free ticket, free pass or free transportation for passengers, except * * * * to necessary caretakers of live stock * * * * *."

And in the case of K. C. S. Ry. Co. v. Van Zant, *supra*, this Court said:

> "The provision for passes, with its sanction in penalties, is a regulation of interstate commerce to the completion of which the determination of the effect of passes is necessary. We think, therefore, free passes in their entirety are taken charge of,—not only their permission and use, but the limitations and conditions upon their use. Or, to put it in another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of the responsibility the railroad incurs by their issuance, and the extent of the right the person to whom issued acquires,, are taken charge of."

And the Court further said, after referring to other cases:

> "Those cases were considered and applied as giving validity to the stipulations in passes issued under the Act in Charleston & W. C. R.R. Co. vs. Thompson, 234 U.S. 576, according thereby freedom of transportation to the possessors of a pass, and giving assurance to the railroad company that its gratuity will not be given the consequences of compensated right and its incident obligations, and be a means of exacting from the company indefinite damages. * * * The pass proceeded from the Federal Act; it is controlled necessarily in its incidents and consequences by the Federal act, to the exclusion of state laws and state policies, and such is the effect of the cited cases."

The stipulations in such passes are to be tried according to the Act of Congress and the decisions of the Federal Court.

G. F. & A. Ry. Co. v. Blish Milling Co., 241 U.S. 190.
N. O. & N. E. R.R. v. Harris, 247 U.S. 367.
N. O. & N. E. R.R. v. Scarlett, 249 U.S. 528.
Charleston Ry. v. Thompson, 234 U.S. 576.

The pass for a caretaker of live stock, being included in the same clause of the Interstate Commerce Act as other permissible passes, is to be considered as a "free" pass within the meaning of the Act, and is to be governed according to the Act and the decisions of this Court.

This Court in Charleston & W. C. R.R. Co. v. Thompson, *supra*, referring to such passes said:

> "To most of those enumerated, the pass would be gratuitous in the strictest sense, and when all that may receive them are grouped in a single exception, we think it plain that the statute contemplates a pass as gratuitous and in the same sense to all."

The transportation was interstate, and the stipulation was known to the respondent. In violating the stipulation

he was injured. The stipulation expressly provided that no agent had authority to alter, to change, or modify its terms.

The Supreme Court of Arkansas erred in holding that the stipulation was abrogated by the suggestion of the conductor of the train, and that the suit was not for "breach of the contract," but was based upon the maxim "respondeat superior," which imputes liability to a master for the negligent acts of his servant.

The Circuit Court of Appeals for the Eighth Circuit, in the case of Smith v. Atchison, Topeka & Santa Fe Railroad Co., 194 Fed. 79, where the facts were similar to the facts in this case said:

> "The contract is by its terms tied to the tort, and the same law should be applied to the one as to the other."

In the case of Illinois Central Railroad Co. v. Jennings, 229 Ill. 608, in which the same question was involved as in this case, the Court said:

> "Appellee's testimony to the effect that the conductor was in charge of the train and was giving orders in connection with the train, and had authority over the train does not tend to show that the conductor had apparent authority to alter the written contract or waive the provision thereof by which appellee was required to ride in the caboose."

We respectfully submit that there is an irreconcilable conflict in the decisions of this Court, the Circuit Court of Appeals, the Supreme Court of Illinois, holding that such stipulations in passes are valid and binding, and the holding of the Supreme Court of Arkansas in this case to the effect that such a stipulation is not a defense.

Respectfully submitted,

EDWARD J. WHITE,
THOMAS B. PRYOR,
Counsel for Petitioner.

MISSOURI PACIFIC RAILROAD COMPANY *v.* HANNA.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 54. Submitted October 8, 1924.—Decided November 17, 1924.

A writ of certiorari to a state court will be dismissed when the record fails to show that the federal question indicated in the petition for the writ was raised below.

Writ of certiorari to review 157 Ark. 32, dismissed.

CERTIORARI to a judgment of the Supreme Court of Arkansas which sustained a judgment recovered by the respondent for personal injuries suffered by him in Illinois, while a passenger on the petitioner's railroad.

Mr. Thomas B. Pryor and *Mr. Edward J. White* for petitioner.

Mr. Arthur L. Adams for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

When this writ was granted, we, of course, supposed petitioner had properly raised and relied upon the indicated federal question in the courts below by claiming that its responsibility for injuries sustained by respondent while traveling on an interstate drover's pass depended upon acts of Congress and applicable principles of common law as interpreted and applied by the federal courts. *Southern Express Co.* v. *Byers*, 240 U. S. 612, 614.

The record fails to disclose that it definitely raised the point in either trial or supreme court. On the contrary, it was there insisted that liability should be determined under the laws of Illinois, the State wherein the accident occurred.

The writ is accordingly

Dismissed.